IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-909, 75-960, 75-1050 and 75-1055

ENVIRONMENTAL PROTECTION AGENCY, *Petitioner,*

v.

EDMUND G. BROWN, JR., GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.

ENVIRONMENTAL PROTECTION AGENCY, *Petitioner,*

v.

STATE OF MARYLAND, ET AL.

COMMONWEALTH OF VIRGINIA, EX REL.
STATE AIR POLLUTION CONTROL BOARD, *Petitioner,*

v.

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *Petitioner,*

v.

DISTRICT OF COLUMBIA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH, FOURTH AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR THE STATES

STATE OF ARIZONA
STATE OF CALIFORNIA
STATE OF MARYLAND
COMMONWEALTH OF VIRGINIA
DISTRICT OF COLUMBIA

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OPINIONS BELOW

The States adopt the summary of the Opinions Below which appears in the Brief for the Federal Parties.

JURISDICTION

The States adopt the statement of Jurisdiction which appears in the Brief for the Federal Parties. For purposes of clarification, the States note that a separate petition for a writ of certiorari to the Court of Appeals for the District of Columbia was filed by the State Air Pollution Control Board of the Commonwealth of Virginia. That petition was granted on June 1, 1976, the same day upon which the Court granted the petitions of the Administrator of the Environmental Protection Agency (A. 980-981).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Administrator of the Environmental Protection Agency has omitted, contrary to Rule 40(c) of this Court, the following regulations which are involved in this case.

(1) 40 C.F.R. §52.132 (A. 573-77).
Vehicle emission inspection and maintenance regulations for Phoenix-Tucson Air Quality Control Region ("AQCR").

(2) 40 C.F.R. §52.242 (A. 503-05).
Vehicle emission inspection and maintenance regulations for the five California AQCR's.

(3) 40 C.F.R. §52.490 (A. 637-38).
Vehicle emission inspection and maintenance regulations for the District of Columbia portion of the National Capital Interstate AQCR.

(4) 40 C.F.R. §52.1089 (A. 668-71).
Vehicle emission inspection and maintenance regulations for the Maryland portion of the National Capital Interstate AQCR.

(5) 40 C.F.R. §52.2441 (A. 699-702).
Vehicle emission inspection and maintenance regulations for the Virginia portion of the National Capital Interstate AQCR.

(6) 40 C.F.R. §52.1095 (A. 753-55).
Vehicle emission inspection and maintenance regulations for the Metropolitan Baltimore Intrastate AQCR. This regulation, which is typical of the Administrator's vehicle emission inspection and maintenance regulations at issue in this case is also set forth for convenience in Appendix A *infra*.

(7) 40 C.F.R. §52.476(g) and (h) (A. 624-26).
Increased bus fleet and exclusive bus lane regulations for the District of Columbia portion of the National Capital Interstate AQCR.

(8) 40 C.F.R. §52.1080(g) and (h) (A. 658-59).
Increased bus fleet and exclusive bus lane regulations for the Maryland portion of the National Capital Interstate AQCR.

(9) 40 C.F.R. §52.2435(e) and (f) (A. 690-91).
Increased bus fleet and exclusive bus lane regulations for the Virginia portion of the National Capital Interstate AQCR.

(10) 40 C.F.R. §52.23 *Violation and Enforcement*, set forth at p. 31 *infra*.

QUESTIONS PRESENTED

1. Whether the Administrator of the Environmental Protection Agency has the power under the Clean Air Act to require a state to enact laws and regulations establishing air pollution control programs and to administer and enforce those programs.

2. Whether the Clean Air Act empowers the Administrator of the Environmental Protection Agency to seek sanctions against a state and its officials for failure to enact, administer and enforce air pollution control programs promulgated by the Administrator.

3. Whether, if the Administrator has such statutory authority, the Clean Air Act is a valid exercise of Congress' power under the Commerce Clause and whether it violates state sovereignty and principles of federalism inherent in the Constitution of the United States.

4. Whether the Commonwealth of Virginia, the State of Maryland and the District of Columbia can be compelled to provide funds to the Washington Metropolitan Area Transit Authority for the purchase of buses.

STATEMENT OF THE CASE

The following Statement of the Case is presented for purposes of emphasis, conciseness and clarity.

The Clean Air Act

In 1970 Congress extensively amended the Clean Air Act.[1] Those amendments require the Administrator of the Environmental Protection Agency to establish air quality criteria[2] and to set primary and secondary

[1] Clean Air Amendments of 1970, 84 Stat. 1676 (amending 42 U.S.C. 1857 *et seq.)*. The statutory history of the Clean Air Act and the 1970 Amendments is discussed in Argument II A at pp. 27-28 *infra*. The Clean Air Act was further amended by Section 302, 85 Stat. 464, and by the Engergy Supply and Environmental Coordination Act of 1974, 88 Stat. 246. For convenience, further references to the "Clean Air Act" will mean the Clean Air Act as amended to date.

[2] 42 U.S.C. 1857c-3(a); Clean Air Act §108(a).

ambient air quality standards[3] for air pollutants. To date, the Administrator has issued air quality criteria and primary and secondary air quality standards for sulfur oxides, particulate matter, nitrogen oxides, carbon monoxide, hydrocarbons, and photochemical oxidants. The principal source of carbon dioxide, hydrocarbons, photochemical oxidants and nitrogen oxides as pollutants in the ambient air is motor vehicle emissions.

The Clean Air Act further requires each state[4] to devise and submit to the Administrator for approval a plan for the implementation, maintenance and enforcement of the primary and secondary air quality standards in each air quality control region (AQCR) within the state.[5] Each state implementation plan must contain certain provisions, including:

> (B) . . . Emission limitations, schedules, and time-tables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls; . . .
>
> (F) . . . necessary assurances that the State will have adequate personnel, funding and authority to carry out such implementation plan . . . [and]

[3] 42 U.S.C. 1857c-4; Clean Air Act §109. Primary standards are standards necessary to protect the public health. Secondary standards are those required to protect the public welfare from known or anticipated adverse effects.

[4] The District of Columbia is treated as a state under the Clean Air Act. 42 U.S.C. 1857h(d); Clean Air Act §302(d). *See* Argument II E at pp. 52-55 *infra*.

[5] The implementation plans were required to be submitted within nine months after April 30, 1971, the date the Administrator promulgated the ambient air quality standards. 42 U.S.C. 1857c-5(a)(1). Clean Air Act §110(a)(1).

(G) . . . [provision] to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards.[6]

To be approved by the Administrator, state implementation plans must provide for the attainment of the primary air quality standards within three years and the secondary air quality standards within a specified reasonable period of time.[7] If a state fails to propose an implementation plan or if the plan it proposes is not acceptable to the Administrator under the criteria set forth in the Clean Air Act, the Act requires the Administrator to promulgate a substitute plan which will achieve timely attainment of the national primary and secondary air quality standards within the state.[8]

All of the states that are parties to this case (the "States") submitted implementation plans to the Administrator in early 1972. However, during the period of initial implementation of the 1970 Amendments to the Clean Air Act, the Administrator recognized that the states ". . . had practically no experience with transportation control measures as a means of dealing with air quality problems and that available data were not sufficient to permit states to develop meaningful transportation control schemes and predict their impact on air quality."[9] Accordingly, the Administrator advised the States that transportation control schemes could be deferred beyond the statutory deadline for the submission of implementation plans, so long as the plans submitted defined the degree of

[6] 42 U.S.C. 1857c-5(a)(2)(B), (F) and (G); Clean Air Act §110(a)(2)(B), (F) and (G).

[7] 42 U.S.C. 1857c-5(a)(2)(A); Clean Air Act §110(a)(2)(A).

[8] 42 U.S.C. 1857c-5(c)(1); Clean Air Act §110(c)(1).

[9] *See, e.g.*, 37 Fed. Reg. 10844 (May 31, 1972).

emission reduction which could be achieved by the transportation control measures being considered.[10]

However, the United States Court of Appeals for the District of Columbia ruled on January 31, 1973 that the Clean Air Act did not permit either the delay in submission of transportation control plans or an extension of time within which to meet the primary ambient air quality standards.[11] The court's order directed the Administrator to rescind his extensions and to require the States to submit transportation control plans by April 15, 1973 and to attain the primary ambient air quality standards by May 31, 1975. The Administrator was expressly forbidden to grant any extension of the deadline for attaining the primary air quality standards unless a state had made every effort to achieve the standards, including the implementation of all "reasonably available alternative means."[12] Accordingly, the Administrator revoked all extensions previously granted and ordered each state which had deferred submission of land-use and transportation control strategies to submit the required plans by April 15, 1973.[13]

The Transportation Control Plans

Officials of Arizona, Maryland, Virginia and the District of Columbia submitted, within the time prescribed, transportation control plans for the air quality control regions within their respective jurisdictions. The plans for the following air quality control regions in those States are involved in this case: the Phoenix-Tucson Intrastate AQCR, the Metropolitan

[10] 36 Fed. Reg. 15486 (August 14, 1971).

[11] *Natural Resources Defense Council v. Environmental Protection Agency*, 475 F.2d 968 (D.C. Cir. 1973).

[12] 42 U.S.C. 1857c-5(e)(1)(B); Clean Air Act Section 110(e)(1)(B).

[13] 38 Fed. Reg. 7323-24 (March 20, 1973).

Baltimore Intrastate AQCR (Baltimore City and the five surrounding counties), and the National Capital Interstate AQCR (the District of Columbia and the Maryland and Virginia suburbs). California was not able to prepare a transportation control plan for its five intrastate AQCR's within the limited time available.

Each of the State-submitted plans proposed a wide range of strategies to reduce air pollution caused by motor vehicle emissions, including a mandatory annual emission inspection and maintenance program for various classes of vehicles. The Maryland, Virginia, and District of Columbia plans also proposed measures to encourage the use of public transportation in the Washington D.C. region by creating disincentives to private vehicle use, by adding more buses to the Washington Metropolitan Area Transit Authority's (WMATA)[14] fleet, and by establishing exclusive reversible bus lanes in specified highway corridors.[15]

The Administrator approved some parts and disapproved other parts of Arizona's plan for the Phoenix-Tucson AQCR, Maryland's plan for the Metropolitan Baltimore Intrastate AQCR, and Maryland's, Virginia's, and the District of Columbia's plans for their respective portions of the National Capital Interstate AQCR. Ironically, the reason that the Administrator gave for disapproving several of the States' proposals, including the inspection and maintenance programs,

[14] WMATA is an independent corporate body created by compact between Maryland, Virginia, and the District of Columbia with the approval of Congress. The compact is discussed in detail in Argument IV at pp. 78-85 *infra*.

[15] The States' plans were submitted, in the case of Maryland and Arizona by the Governor, and, in the case of Virginia by the State Air Pollution Control Board. The Virginia plan expressly stated that implementation of the inspection and maintenance program depended upon the approval of the Virginia legislature and further cautioned that the Board could not guarantee the commitment of funds for the purchase of additional buses by WMATA (A. 905-910).

the exclusive bus lane provisions, and the purchase of additional buses by WMATA, was the failure of the States to demonstrate that they had the requisite legal authority to implement and fund those transportation control strategies.[16]

As noted above, Section 110(c) of the Clean Air Act requires the Administrator, if he disapproves a state plan in whole or in part or if a state fails to submit a plan, to promulgate his own implementation plan designed to attain the ambient air quality standards. With respect to the States, the Administrator apparently believed that he could comply with this Section 110(c) requirement by merely adopting regulations ordering them in turn to develop, establish, implement, and enforce a large number of transportation control strategies. The Administrator's regulations, promulgated during November and December of 1973, required the States to undertake, by legislation and regulation, such measures as:

—inspection and maintenance programs for various classes of vehicles;

—retrofit programs requiring emission control devices of an unspecified type on various classes of older vehicles;

—restrictions on the use of motorcycles;

[16] *See, e.g.*, 40 C.F.R. §§52.474 (A. 621), 52.1074 (A. 652), 52.2430 (A. 686).

For example, 40 C.F.R. §52.2430 *Legal Authority*, identifying shortcomings in the state-submitted implementation plan of Virginia provides:

> (a) The requirements of Section 51.11(c) of this chapter are not fully met because the plan does not adequately identify or provide copies of all laws or regulations necessary for implementing the transportation control measures. (b) The requirements of Section 51.11(f) of this chapter are not fully met because it is not clearly demonstrated that all local agencies have requisite legal authority, or that the State retains responsibility for implementing the transportation control measures.

—express bus and carpool lanes on major transportation corridors;

—computerized carpool information services;

—a network of bicycle lanes and storage facilities;

—elimination of free on-street commuter parking;

—parking surcharges;

—a gasoline rationing program for the Metropolitan Baltimore Intrastate AQCR and the five California AQCR's;

—the establishment of commercial rates at federal parking facilities in Washington D.C.; and

—the purchase of a total of 475 additional buses by WMATA.

Thus, the significant modification made by the Administrator to the State-submitted plans in each instance was the imposition of a requirement that the States enact and enforce laws and regulations necessary to carry out the various programs. For example, on November 21, 1973 the Administrator approved Arizona's inspection and maintenance program as submitted by the Governor but added the mandate that Arizona must submit, within two months, proposed legislation and regulations and funding authority and, within five months, evidence confirming their enactment and adoption.[17]

The Administrator's regulations with respect to the other transportation control strategies followed a similar pattern. The States were ordered to submit

[17] 40 C.F.R. §52.132(c) (A. 573-75) provides:

> To implement the approved control measures . . . the State of Arizona must submit to the Administrator . . .
>
> (1) No later than February 1, 1974 . . . (i) The text of proposed legislation and regulations for the inspection and maintenance program . . . (ii) A signed statement from the governor or his designee identifying the sources and amounts of funds for the programs. If the funds can not legally be obligated under existing statutory authority, the text of needed legislation shall be submitted. (iii) The date by which the State will recommend all needed legislation to the State legislature . . .
>
> (2) No later than May 1, 1974, the legislative authority for implementing the inspection and maintenance program . . .
>
> (3) No later than September 1, 1974 the adopted regulations and administrative policies necessary for implementation of the control measures . . .

legally adopted regulations, containing specified provisions, establishing the particular program. The Administrator specifically directed the States to provide for enforcement procedures and sanctions and penalties for violations of those regulations. The States were also ordered to submit detailed compliance schedules containing the text of needed legislation and regulations, the date the State would recommend needed legislation to the State legislature, and a signed statement from the Governor or his representatives identifying the sources of funds for the program and the text of any legislation needed to appropriate the funds.[18]

Section 113 of the Clean Air Act provides for federal enforcement of implementation plans and imposes civil and criminal sanctions for violations of those plans.[19] The Administrator's regulations provide that if a governmental entity fails to comply with the provisions of an implementation plan, it will be subject to an enforcement action under Section 113. Noncompliance is defined as failure to submit a compliance schedule required by an implementation plan, failure to include the required elements in a compliance schedule, or failure to comply with the schedule.[20]

[18] *See, e.g.*, 40 C.F.R. §§52.242, 52.490, 52.1089, 52.1095 and 52.2441 (Inspection and maintenance program); 40 C.F.R. §§52.476(g), 52.1080(g) and 52.2435(e) (Purchase of buses by WMATA).

[19] 42 U.S.C. 1857c-8. Section 113(c) of the Clean Air Act provides for fines of up to $25,000 a day and a prison term of not more than one year.

[20] 40 C.F.R. §52.23. *See* p. 31 *infra*.

The States note that the present Administrator disclaims any intention to seek criminal penalties against state officials and represents that he will seek to obtain compliance by administrative orders and administrative conferences.[21] However, the Administrator's mood has not always been so conciliatory. He has threatened to seek drastic sanctions in order to gain compliance with his regulations including the imposition of a receivership on certain state functions, holding state officials in civil contempt and imposing substantial daily fines, and requiring a state to allocate funds from one portion of its budget to another. *Brown v. Environmental Protection Agency*, 521 F.2d 827, 831 (9th Cir. 1975).[22]

After the Administrator promulgated final regulations imposing on the States the requirement to develop and implement transportation control strategies, the States petitioned the appropriate Courts of Appeals for review of the regulations pursuant to Section 307 of the Clean Air Act.

While Maryland's and Virginia's petitions were pending in the courts, state agencies in both States sought legislation establishing vehicle inspection and maintenance programs. In 1973, the Maryland Department of Transportation submitted proposed legislation to the General Assembly which would have given the Motor Vehicle Administration the power to conduct

[21] Brief for the Federal Parties at 38 n. 32.

[22] The Administrator has recently filed an enforcement action in the United States District Court for the Southern District of Ohio seeking to enjoin, and seeking "other and further relief", against the Ohio Department of Highway Safety and its Director from issuing license plates to vehicles in the Ohio portion of the Metropolitan Cincinnati Interstate AQCR which have failed to comply with EPA-mandated emission standards. *United States v. Ohio Department of Highway Safety*, Civ. No. C-2-76-835 (S.D. Ohio, filed Nov. 19, 1976).

annual emission tests and to deny registration to vehicles that failed to comply with emission standards set by the Maryland Department of Health and Mental Hygiene. Similar legislation was submitted by the Governor in 1974. In both years, the proposed legislation was defeated in committee.[23]

The Virginia Air Pollution Control Board also requested legislative authority from the 1974 Virginia General Assembly for an inspection and maintenance program. One bill, H.B.668, proposed a decal or sticker system for enforcement, similar to Virginia's safety inspection program. Another bill, H.B. 1014, provided for the denial of registration to vehicles that failed the emission inspection test. The committee to which the bills were referred voted to carry over the bills to the 1975 legislative session.

In 1975, the bill creating the above described emission inspection program was substantially amended by the House of Delegates to create a voluntary program during 1975, but effective only if the District of Columbia and Maryland enacted similar legislation. In the Virginia Senate, the bill was further amended to exclude Prince William County and the City of Alexandria, and it was then enacted into law.[24] The second bill providing for the denial of registration was killed in committee.

The situation with respect to the Administrator's regulations that require the purchase of additional buses by WMATA is described at Argument IV *infra*.

SUMMARY OF ARGUMENT

This case presents important questions concerning the proper role of the federal government and the states

[23] House Bill 321, introduced January 12, 1973. Maryland House Journal (1973) at 185. House Bill 1405, introduced March 4, 1974. Maryland House Journal (1974) at 1256.

[24] Virginia Acts of Assembly, Ch. 342 at 570 (1975).

in the federal system. Framed most broadly, the issue before this Court is whether a federal executive officer can force the states to use their legislative and executive powers to implement federal programs.

This issue arises in the context of the Administrator's regulations, issued under the Clean Air Act, which require the States to enact and enforce laws and regulations establishing air pollution control programs under threat of civil and criminal penalties. The specific regulations at issue here require the States to establish complex vehicle emission inspection and maintenance programs, and require Maryland, Virginia and the District of Columbia and their local jurisdictions to expend approximately $34 million for new buses for public transportation and to set aside express bus lanes on extensively travelled highway corridors. The implications of those regulations for the States are appalling. The Administrator's programs at issue here will make at best a small contribution to achieving the ambient air quality standards required by the Clean Air Act. Thus, the Administrator must develop numerous additional programs to comply with the mandate of the Act, and if those programs follow the form of those he has selected for review in this case, their impact on the State, although impossible to predict precisely, would be enormous.

The Administrator's transportation control regulations suffered serious setbacks in the Courts of Appeals, three out of four of which held that the Clean Air Act does not authorize the Administrator to require the states to legislate or adopt regulations. Faced with that rebuff, the Administrator, with a surprising lack of candor, represents to this Court that his regulations have never required the States to legislate. He also maintains that he will withdraw all parts of the regulations which require the States to submit regulations and that he will now require the States only to

"implement" his programs. The States urge that this Court must review the Administrator's regulations as he issued them and threatened to enforce them, and not on the basis of his eleventh-hour concessions. There is no substantive difference between the Administrator's new position and that expressed in his current regulations. The States cannot implement a federal program without legislating and adopting regulations.

The Administrator's assertion of the power, both under the Clean Air Act and the Constitution, to require the States to legislate and regulate and to enforce federally dictated programs rests on a deceptively simple syllogism. He argues that motor vehicles cause air pollution, that the States have encouraged the use of motor vehicles by governmental policy decisions with respect to the public highways, and therefore the States, as owners and operators of the highways, are polluters subject to federal regulation. The syllogism is riddled with weaknesses.

Neither the structure nor the history of the Clean Air Act contain any hint that Congress intended to treat the states as polluters, subject to the enforcement provision of Section 113, because they own and operate the roads or because they are unable or unwilling to establish, implement or enforce the Administrator's programs. Under Section 110 and Section 113, the states have the primary responsibility to develop and enforce, respectively, air pollution control programs. The federal government's role under Section 110 is to review and approve the states' programs and to promulgate a federal plan if the state plan will not achieve the air quality standards. Section 113 creates a parallel enforcement role for the federal government. If the states cannot, because they lack authority or because they have established other priorities, implement and enforce the Administrator's programs, the Administrator must assume implementation responsibility for those functions himself.

The Administrator's assertion of the power to force the states to exercise their governmental powers on his behalf represents arrogant defiance of almost two hundred years of cooperation between the federal government and the states. In the past, the federal government has always had ample power to achieve its purposes by acting directly on private individuals, by conditioning availability of federal funds to the states on their compliance with federal standards and by preempting state activities that interfere with federal goals. The Administrator bears a heavy burden to establish that Congress discarded those time-honored methods and opted for the heavy hand of coercion. The States submit that he has not met that burden.

To support his radical assertion of federal power, the Administrator must rely on two novel constitutional theories. First, he asserts that state governmental policies with respect to the public highways, including the failure of the states to regulate private individuals whose vehicles cause air pollution, constitutes a burden on interstate commerce. Second, he argues that under the Commerce, Necessary and Proper and Supremacy Clauses he possesses the power to require the States to exercise governmental powers to regulate private individuals who use the highways. The Administrator finds no support for those constitutional theories in the structure of the Constitution, or in any decision of this Court.

His assertion of the power to conscript the legislative and executive powers of the States violates three fundamental structural principles of our federal system, all of which emerge with remarkable clarity from the history of the Constitution. First, the Constitution limits the powers of the federal government to specific subjects, such as interstate commerce. The legislative and executive powers of the States are not commerce in the constitutional sense.

Second, as this Court has repeatedly recognized, "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter but because the Constitution prohibits it from exercising the authority in that manner." *National League of Cities v. Usery*, 96 S. Ct. 2465, 2471 (1976). The Administrator's regulations displace the functions that are most "essential to separate and independent existence," the governmental processes of the states. *Id.*

Third, the Supremacy Clause, as the constitutional mechanism for resolving conflicts of federal and state power, permits Congress to preempt state action or to require the states, if they choose to act at all, to regulate interstate commerce to conform to federal standards. It is not an independent source of federal power under which Congress can require the states to exercise their essential governmental functions.

ARGUMENT

I.

THE ADMINISTRATOR HAS CONCEDED THAT THE REGULATIONS AT ISSUE IN THIS CASE ARE INVALID.

The Administrator's regulations, by their very terms, require the States to enact legislation and adopt regulations. All of the Courts of Appeals below read the Administrator's regulations to impose such a requirement. Indeed, until his opening brief in this Court, the Administrator had always confidently asserted the power to require the States to enact legislation and adopt regulations.

In that brief the Administrator retreated from the position he consistently took before the Courts of Appeals. He now states that he has never asserted the

power to direct the States to enact legislation establishing transportation control plans.[25] Furthermore, he desperately attempts to rewrite his own regulations in a footnote to his brief by "conced[ing] the necessity of removing from the regulations all requirements that the States submit legally adopted regulations . . ."[26] With respect to the vehicle inspection and maintenance program, the Administrator now acknowledges that if the States fail to adopt an adequate plan, he must then promulgate "a comprehensive substitute plan, specifying such matters as the types of vehicles to be inspected, the standards that must be met and the frequency of inspection. The State must then implement the program by establishing the necessary inspection facilities, conducting inspections, refusing to register

[25] Brief for the Federal Parties at 20 n. 14, 54. Despite his current assertions to the contrary, in his brief in the Court of Appeals for the Fourth Circuit, the Administrator "boldly" took the position that his regulations "require the State to enact enabling legislation." *Maryland v. Environmental Protection Agency*, 530 F.2d 215, 224 (4th Cir. 1975). In the Ninth Circuit, the court described the Administrator's position as asserting the power to "direct that a state . . . enact such laws to control air pollution as the Administrator might require . . ." *Brown v. Environmental Protection Agency*, 521 F.2d 827, 838 (9th Cir. 1975). In the Court of Appeals for the District of Columbia the Administrator disclaimed any intention to compel state officials to enact laws or adopt regulations, but he clearly asserted the power to do so. *District of Columbia v. Train*, 521 F.2d 971, 982 n. 19 (D.C. Cir. 1975). The Court of Appeals for the Third Circuit found that the regulations "will require the Commonwealth [of Pennsylvania] to exercise its legislative and administrative powers, for that is the means by which a state regulates its transportation system." *Pennsylvania v. Environmental Protection Agency*, 500 F.2d 246, 262 (3rd Cir. 1974). Finally, in his petition for a writ of certiorari in *EPA v. Brown*, the Administrator asserted the power to compel the states to implement his substitute vehicle inspection and maintenance program ". . . although this may require . . . enactment of complementary state legislation." October Term 1975 Pet. No. 75-909 at 17-18.

[26] Brief for the Federal Parties at 20 n. 14.

nonconforming vehicles, and enforcing its registration laws."[27] There are two fundamental defects in the Administrator's new position.

A. The Regulations As Promulgated Require The States To Legislate, And The States Are Entitled To Have This Case Decided On That Basis.

The regulations that are before this Court for decision are those which the Administrator promulgated in 1973 and which were considered by the Courts of Appeals below. Significantly, the Administrator has never amended or withdrawn the regulations in accordance with the provisions of the Clean Air Act, and he cannot, by means of a footnote in a brief to this Court, jettison regulations that are clearly invalid and then divert this Court's attention to hypothetical regulations which he now considers more defensible.

The Administrator's regulations as promulgated speak only to the states. They expressly require the states to enact laws, to submit legally adopted regulations and to engage in other acts of governance which establish a complex vehicle inspection and maintenance program, commit the States and their subdivisions to the purchase of buses, and create exclusive one-way bus lanes in specified corridors in metropolitan areas. Failure to comply with the Administrator's regulations exposes state officials to criminal and civil penalties and other sanctions under Section 113 and 40 C.F.R. §52.23 and to citizen suits brought pursuant to Section 304 of the Clean Air Act. The States take cold comfort from the Administrator's representations that he will not enforce his regulations by using all available sanctions. At no time has the Administrator renounced the proposition that he has the statutory and constitutional power to impose civil and criminal penalties on state officials who fail to comply with his directives.

[27] *Id.*

Furthermore the Administrator has not complied with his latest interpretation of what the Clean Air Act requires him to do after he disapproves a transportation control plan submitted by a state. Clearly, he has not promulgated, as he now concedes he is required to, either an adequate substitute inspection and maintenance program or a comprehensive substitute transportation control plan.

The Court of Appeals for the District of Columbia found that the Administrator's "plan", far from being comprehensive, merely "shove[d] the responsibility for adopting regulations back onto the states." *District of Columbia v. Train,* 521 F.2d 971, 982 (D.C. Cir. 1975). For example, although the Administrator represents to this Court that his vehicle inspection and maintenance regulations contain emission standards and limitations, in fact they do not, and the Court of Appeals for the District of Columbia specifically so held. *Id.* at 986-87, 995.[28] Those regulations, as now in effect, merely require that the States themselves establish "inspection failure criteria consistent with the failure of [a specified percentage] of vehicles in the first inspection cycle."[29] Because of that deficiency, and similar deficiencies with respect to other transportation control strategies, the Court of Appeals for the District of Columbia held that the Administrator had failed to comply with his obligation under Section 110(c) of the Clean Air Act to promulgate complete substitute programs which would attain air quality standards. *Id.*

[28] The Court of Appeals remanded the inspection and maintenance regulations and retrofit regulations to the Administrator with directions that he promulgate a full set of regulations for the attainment of air quality standards as required by the Clean Air Act, *District of Columbia v. Train,* 521 F.2d 971, 987, 995 (D.C. Cir. 1975). The Administrator has not sought review by this Court of that determination. October Term 1975 Pet. No. 75-909 at 17 n. 15.

[29] *See, e.g.,* 40 C.F.R. §52.1095(c)(2) (Baltimore Intrastate AQCR).

Furthermore, this Court does not have before it a comprehensive substitute transportation control plan as required by Section 110 (c) of the Clean Air Act. The Administrator has asked this Court to review only his regulations ordering the States to establish inspection and maintenance programs, to commit funds for additional buses, and to establish one-way bus lanes. However, the Courts of Appeals below held invalid other provisions of the Administrator's transportation control regulations, such as the bikeways program and the program to retrofit older vehicles with pollution control devices. The Administrator has not sought review of those decisions. Moreover, the Administrator has withdrawn all provisions of his plans imposing parking control measures,[30] as well as those requiring gasoline rationing.[31]

The Administrator required the States to adopt the numerous transportation control strategies because he determined that all were necessary to attain the ambient air quality standards required by the Clean Air Act. The individual components of the plan were designed to be implemented together to achieve the statutory goal. None of those strategies was ever intended to be sufficient, standing alone.

For example, in the transportation control plan for the Baltimore Intrastate AQCR, the Administrator ordered Maryland to establish a medium and heavy

[30] Congress also amended the Clean Air Act in 1974 by prohibiting the Administrator from instituting a parking surcharge, although he may approve such a measure if it is submitted by a state as part of a plan. 42 U.S.C. 1857c-5(c)(2)(A) and (B); Clean Air Act §110(c)(2)(A) and (B).

[31] 41 Fed. Reg. 45565 (October 15, 1976). Appendix B *infra* In withdrawing the gasoline rationing regulations, the Administrator conceded that "this revocation will render the affected SIPs [State Implementation Plans] defective as a legal matter, since such SIPs will no longer contain regulations which provide for NAAQS [national ambient air quality standards]."

duty vehicle emission inspection and maintenance program in order to make certain that the medium and heavy duty vehicle retrofit programs would achieve their purpose.[32] Now that the Administrator has apparently abandoned the retrofit programs, his inspection and maintenance regulations for medium and heavy duty vehicles in Maryland have no independent validity. Similarly, the purchase of additional buses by WMATA was designed as part of an overall strategy to encourage the use of public transportation and to discourage the use of the private automobile by instituting such disincentives as the parking surcharge and other parking control measures. The Administrator has never reevaluated the need for additional buses in light of the elimination of the parking control measures from his plan.[33]

Thus, the Administrator's transportation control plans in the States are in shambles. He recognizes that the transportation control regulations at issue in this case are invalid as written because they require the States to adopt laws and regulations. Consequently, he is attempting to put before the Court a regulatory scheme, radically different from his 1973 regulations, under which he would establish programs such as the inspection and maintenance program which the States will be required to implement and enforce.

Although the Administrator attempts to present his new regulatory scheme to this Court in the narrow context of a vehicle inspection and maintenance program, the States emphasize that the inspection and maintenance program is but one of the few surviving elements of a complex transportation control plan designed to achieve the ambient air quality standards required by the Clean Air Act. The Administrator has abandoned most of the other elements of that compre-

[32] 40 C.F.R. §§52.1099(d)(4), 52.1100(d)(4); (A. 727, 762-65).

[33] *See* discussion in Argument IV C at pp. 83-84 *infra*.

hensive plan, at least in the sense that he is not seeking review of them by this Court. However, he is still required by the Clean Air Act to promulgate a plan which will achieve statutory air quality standards. To do this he will be required to develop additional programs, all of which, under his proposed regulatory scheme, he will then require the States to set up and enforce.

The States are of the view, for reasons set forth in this brief, that the Administrator's proposed scheme would be invalid. However, the States urge that such a regulatory scheme is not before the Court at this time and that the Court should render a decision on the regulations as the Administrator has issued them and not as he would now choose to rewrite them.

B. Implementation And Enforcement Of Any Emission Inspection And Maintenance Regulations Promulgated By The Administrator Would Require The States To Enact Legislation And Adopt Regulations.

The Administrator argues that the States will be required to take three steps under the inspection and maintenance regulations, as he now chooses to construe them. First, the States must implement the program. Second, the States must deny registration to vehicles that fail to comply with whatever emission standards he issues. Finally, the States will be required to enforce their motor vehicle laws against drivers of vehicles that do not comply with the emission standards. According to the Administrator's current position, nothing in his new regulatory scheme requires the States to legislate or adopt regulations. If it does, the Administrator concedes that the regulations would be invalid.

Any regulations requiring the States to implement and enforce a federal regulatory scheme will require the States to enact laws and regulations and engage in other sovereign acts of governance. For each State, the

single most important piece of legislation is its annual operating budget. It is that legislation which establishes priorities and programs through the appropriation of funds. The Administrator recognized that legislation was a precondition to an effective State transportation control plan when he disapproved the States' plans on the grounds that they failed to demonstrate the legal basis for implementation and when he issued his substitute plans which require the States to submit the necessary legislation and regulation as part of their compliance schedules.

His contorted efforts to avoid that fact at this late date, and his statement that the federal regulations themselves provide the basis for the Stat to carry out his program,[34] demonstrate his profound misunderstanding of the nature of our federal system of government. State governments derive their powers to act from state laws and constitutions. A federal official has no power under the Commerce Clause, the Necessary and Proper Clause, or the Supremacy Clause to confer upon state agencies or officials powers which the state legislature has not granted, and then require those state officials to exercise those powers under threat of criminal and civil sanctions.[35] The Administrator cites no decision of this Court, or any court, in support of his assertion of the power to do so.

There is also no authority under the States' laws now in effect to enforce the Administrator's emission

[34] Brief for the Federal Parties at 53-54. The Regional Administrator of Region VI has either not been informed of the Administrator's novel constitutional theories or he finds them unpersuasive. In his comments to the proposed amendments to the transportation control plans for the Texas AQCR's, the Regional Administrator stated that "implementation of any mandatory state inspection and maintenance program in Texas will not begin until the Texas legislature takes affirmative action on such a program." 41 Fed. Reg. 49848 (November 11, 1976).

[35] See Argument III of this Brief.

inspection and maintenance program. For example, his regulations require the States to conduct spot checks and to impose penalties on individuals who modify their vehicles after inspection so that those vehicles no longer meet the emission standards.[36] The States cannot impose a primary duty on motor vehicle owners to maintain the required emission controls, create enforcement procedures and impose sanctions against violators without enacting legislation and adopting regulations. If the Administrator were to issue federal regulations imposing such a duty on private individuals and creating sanctions for violations, then the States, in the absence of state enabling legislation, would have no authority to enforce, and could not be compelled to enforce, those regulations.[37] If the federal regulations provided for criminal sanctions, the state courts could not exercise jurisdiction over violations unless Congress specifically so provided.[38]

In summary, the Administrator concedes that he cannot directly order the States to legislate, but he claims that he can create and describe a particular governmental program and then order the States to establish that program. That "implementation and enforcement" of the federally dictated program necessarily requires the States to legislate and regulate is not viewed by the Administrator as significant.

The States submit that the Administrator's concessions in his opening brief represent a transparent effort to salvage the device he seized upon to avoid his statutory responsibility to fund and enforce his own

[36] *See, e.g.*, 40 C.F.R. §52.490(c)(4), 52.1089(c)(4), 52.2441(c)(4).

[37] *See generally*, Charles Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 546 (1925).

[38] 18 U.S.C. 3231 provides that "[t]he district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

programs in the event the States were unable or unwilling to act. The Administrator's regulations, both as promulgated and as proposed, require the States to enact laws and regulations, and in so doing violate both the Clean Air Act and the Constitution of the United States.

II.

THE ADMINISTRATOR LACKS AUTHORITY UNDER THE CLEAN AIR ACT TO REQUIRE THE STATES TO ENACT LAWS, ADOPT REGULATIONS, AND ENFORCE FEDERALLY MANDATED REGULATORY PROGRAMS.

The Administrator has endeavored in his opening brief at pages 26 through 40 (particularly pp. 36-40) to link together Section 110 of the Clean Air Act, relating to plan development, and Section 113, relating to federal enforcement of plan violations. This effort is made to support a finding not simply that a state is a "person" but that it is a "person . . . in violation" of the Act when it fails to legislate against, appropriate monies for and otherwise regulate according to federal standards the pollution-creating activities of its own private citizens. This *tour de force* is aided by the mechanism of an extraordinary, one-paragraph EPA regulation (40 C.F.R. §52.23), the full text of which is set out at page 31 *infra,* which states that a "person or governmental entity" becomes subject to the civil and criminal sanctions of Section 113 when it fails to comply with federal implementation plan regulations. The emission inspection and maintenance of private vehicles, bus lane and bus fleet "strategies" are, of course, just such regulations.

Ordinary principles of statutory construction as well as the legislative history of not only Section 110 and Section 113, but of the entire Clean Air Act and its predecessors dating from 1955, provide no basis whatsoever for this Procrustean analysis. Congress

provided a straight-forward approach for curing inadequacies in state plans or inabilities of states to carry out plans, namely the assumption by EPA, with federal dollars and staff under a federal plan, of the enforcement function against private citizens in violation. Congress did not offer EPA the option of redelegating this function. This being the case, the Administrator's word games (indirect/direct pollution sources; indirect/direct state legislation requirement; state as polluter/state as operator of pollution-creating source/state as state) pale into insignificance and irrelevance.

A. THE 1970 AMENDMENTS TO THE CLEAN AIR ACT DO NOT MARK A DEPARTURE FROM THE STATUTE'S HISTORY OF COOPERATIVE FEDERALISM.

The 1963 Clean Air Act established the principle of deference to rather than coercion of the states in air pollution control matters.[39] Section 1 of that Act for the first time provided, in relevant part ". . . that the prevention and control of air pollution at its source is the primary responsibility of states and local governments . . ."[40] Far from evidencing any intent to coerce state action, the role of the federal government was clearly to be one of cooperating with and encouraging state efforts. The major innovation in the 1963 Clean Air Act was that the federal government assumed a more prominent role in that it was required to set non-mandatory air quality criteria. It could intervene directly when the states were unable to cope with an air pollution emergency.

[39] Pub. L. 88-206, 77 Stat. 392.

[40] The concept of primary state and local responsibility was taken directly from the Senate Report on the 1955 air pollution act (Act of July 14, 1955, ch. 360, 69 Stat. 322), which merely provided research funds and technical assistance to the states.

Still greater federal involvement arose from amendments to the basic Act in 1965[41] and 1967.[42] The 1965 Act first brought the federal government into the area of auto emission controls by placing standard-setting powers within federal jurisdiction. That Act was also the first to impose mandatory federal air quality criteria, with the states retaining the role of setting emission standards and developing implementation plans. The 1967 Act went further in that direction by granting the federal government the exclusive authority to set not just criteria but the emission levels of automobiles.

The 1970 amendments are merely an extension of prior amendments which accorded to the federal government increasing responsibilities for the direct enforcement of pollution controls. As discussed below, there is nothing in the history of the 1970 amendments which would support the conclusion that Congress intended a marked departure from this historical trend by using the federal commerce power to commandeer the police power of the states, an action never before attempted in air pollution legislation or, for that matter, in any legislation.

B. The Structure Of The Clean Air Act Contemplates That States Might Not Act, The Sole Remedy For Such Inaction Being Federal Planning And Enforcement.

Section 110 of the Clean Air Act[43] provides that "[e]ach State shall . . . adopt and submit to the Administrator . . . a plan which provides for implementation, maintenance and enforcement of such primary standard in each air quality control region (or portion

[41] National Emissions Standards Act, Pub. L. 89-272, 79 Stat. 992.

[42] Air Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485.

[43] 42 U.S.C. 1857c-5.

thereof) within such State."[44] Within four months after the date required for submission of a plan, the Administrator must approve or disapprove the plan, in whole or in part.[45]

In the event that the state fails to submit a plan or the plan is inadequate or the state fails to revise its plan adequately, the Administrator's course of action is charted:

> The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State . . . .[46]

Thus, the states are given the opportunity of retaining responsibility for the design and implementation of air pollution strategies. In the event the states decline to act, the Act authorizes the federal agency to occupy the field itself and to enact the regulations necessary to the achievement of air quality standards.

In light of the fact that the Administrator is specifically directed to promulgate a plan himself in case the state fails to submit a plan, he does not have the alternative or concurrent remedy of jailing or fining officials of a recalcitrant state for failure to submit a plan. The Administrator's sole remedy is to promulgate his plan. As the court stated in *Plan for Arcadia v. Anita Associates*, 379 F. Supp. 311, 314 (C.D. Calif. 1973), *aff'd*, 501 F.2d 390 (9th Cir. 1974):[47]

[44] 42 U.S.C. 1847c-5(a)(1); Clean Air Act §110(a)(1). *See also* Clean Air Act §107(a) (42 U.S.C. 1857c-2(a)) which provides "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan. . . ."

[45] 42 U.S.C. 1857c-5(a)(2); Clean Air Act §110(a)(2).

[46] 42 U.S.C. 1857c-5(c)(1); Clean Air Act §110(c)(1).

[47] In that case private citizens sought (1) to enjoin further construction of a shopping center on the ground that, when completed, it would attract such concentration of vehicular

> [T]here is no judicial remedy provided in the Act or elsewhere for the failure of the state to adopt and submit a plan. The only consequence of a state's failure to submit a plan is that the Administrator then, has the duty to impose a plan upon the state, and no other remedy against the state exists.

Section 113 of the Clean Air Act[48] in turn provides that the state shall have an initial opportunity to enforce the applicable implementation plan. If the Administrator finds that the state is not enforcing the plan in an individual instance[49] or is allowing widespread violations,[50] the Administrator notifies the state, giving it thirty days to cure its failures. If the state still has not acted, the Administrator either takes action against the individual violator, or enforces the Act against all violators, depending upon whether the state's failure to act was specific or general. Section 113(a)(2) authorizes the Administrator to take over direct federal enforcement of an implementation plan when he discovers widespread failure of the state to enforce the plan, and it carefully circumscribes the manner in which the Administrator may act.

Thus, Congress specifically considered the eventuality that the states might fail to administer or enforce an applicable implementation plan. The remedy Congress provided for such a failure by a state is identical to the remedy available should a state fail to submit an implementation plan in the first instance as required by Section 110 of the Act: the Administrator simply steps in and takes over the function himself. There is no hint

traffic as would raise ambient air pollution above the national air quality standards established pursuant to the Clean Air Act, and (2) to compel the State of California to comply with §110 of the Clean Air Act (42 U.S.C. 1857c-5), which requires each state to submit a plan to the Administrator.

[48] 42 U.S.C. 1857c-8.

[49] 42 U.S.C. 1857c-8(a)(1); Clean Air Act §113(a)(1).

[50] 42 U.S.C. 1857c-8(a)(2); Clean Air Act §113(a)(2).

of any compulsion upon the state to act or of fines or imprisonment to be visited upon state officials who decline to do so. The sole "stick" which Congress intended to take to the states is that, to the extent that they failed to enforce federal standards and regulations with respect to air pollution, they would have enforcement matters removed from their hands.

Although the entire history and structure of the Clean Air Act evidences a pervasive deference to the states and negates any intention to coerce the states to act, the Administrator attempts to tie the statute in knots. Section 113 offers the states the opportunity to administer and implement a plan. The only result of failure to do so is federal enforcement. The Administrator, by ordering the states to administer and enforce his plans and by denominating failure to do so a violation under Section 113, is seeking to frustrate congressional intent.

The Administrator's regulation at issue provides:

> Failure to comply with any provisions [of the federal regulations on "Approval and Promulgation of Implementation Plans"] . . . shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act. With regard to compliance schedules, a person or Governmental entity will be considered to have failed to comply with the requirements [of the federal regulations on "Approval and Promulgation of Implementation Plans"] if it fails to timely submit any required compliance schedule, if the compliance schedule when submitted does not contain each of the elements it is required to contain, or if the person or Governmental entity fails to comply with such schedule.[51]

[51] 40 C.F.R. §52.23, promulgated at 39 Fed. Reg. 33512 (Sept. 18, 1974), part of "General Provisions" applicable to all implementation plans. Similar provisions were theretofore contained in the federal plans for the AQCR.

Section 113(c)[52] of the Clean Air Act provides that for a first violation a person may be fined up to $25,000 per day of violation or imprisoned for not more than a year, or both, and, for a second and further violation, a fine of up to $50,000 per day of violation or imprisonment for a maximum of two years, or both, may be imposed.

Congress never intended to expose state officials to fines or imprisonment for failure to successfully carry out the Administrator's own statutory responsibilities. The Administrator's actions are a perversion of congressional intent. He seeks to ignore that intent by semantic sleight of hand and by rummaging about in the ashcans of the legislative process for the scattered, chance remarks of a few senators and congressmen. It is to these matters that we now turn.

C. The Language Of The Clean Air Act Does Not Support The Administrator's Position That The States May Be Forced To Administer And Enforce Implementation Plans.

1. *Section 113 Permits Sanctions Against A State That Pollutes The Air, But Does Not Contemplate Finding A State "In Violation" Of A Plan If It Chooses Not To Regulate Polluters As The Administrator Directs.*

Properly seen, the intent of Section 113 is not to coerce a state to act but to prohibit the Administrator from acting until he has satisfied the precondition of deferring to that state. The thrust of that section is that the Administrator may not inject himself into an enforcement situation unless the state is given the opportunity to act first.

Surely, if Congress had intended to take the unprecedented step of coercing a state to act in order to conserve federal resources, it would have granted the Administrator the power in clear and specific language

[52] 42 U.S.C. 1857c-8(c).

to order the state to take action against violators.[53] Similarly Congress would have used clear and specific language if it intended to empower the Adminstrator to proceed against state officials under sections 113(b) or (c) if the state failed to act.[54] If the violations are "widespread" (section 113(a)(2)), such a course would be far more "efficient" from the Administrator's point of view. Yet Congress did not so provide.

The Administrator's enforcement regulation endeavors to place the failure of a state to legislate or otherwise act according to his directions within the class of "violation of any requirement of an applicable implementation plan." The statute, however, does not support this approach. Section 113(a)(2) deals with a situation where "violations appear to *result from* a failure of the State, in which the plan applies, to enforce the plan effectively" (emphasis added). There is no hint that the failure of a state to act would, in itself, be a violation on the part of that state or its officials. The conclusion is inevitable that the term "violation" refers to pollution "result[ing] from" the emission of pollutants into the air in contravention of the provisions of an applicable implementation plan.

Before federal enforcement of a plan is allowed, for example, two notices must be given: one notice to the state and a second notice to the individual polluter, in case of a single violation, or to the public in case of numerous individual violations. If Congress had expected that the states would be compelled, under pain of federal penalties, to use their police power to enforce

[53] Under Section 113 (a) (1), at the same time an individual violator is given notice of his violation the state is, likewise, advised of the violation and given an opportunity to bring the violator into compliance before EPA may pursue federal enforcement action.

[54] But such action, even if authorized by the Clean Air Act, would be unconstitutional. *See* Argument III *infra*.

the plan, there would be no reason for requiring that *two* notices be given.

The Administrator continues by maintaining that, because the term "person" is defined in section 302(e) of the Act[55] to include a state, he may bring an action against a state for failing to exercise its police powers to control private polluters.[56] This is a *non sequitur.* Section 113 does not authorize enforcement actions against *any* person, but only against persons "in violation". The controlling question is *not* whether a state is a "person" under the Clean Air Act, but whether a state's failure to bow to the Administrator's demand that it exercise its police power in a manner determined by him, in order to control private pollution-causing activities which the Administrator is empowered to control, was intended by Congress to be a "violation" of an implementation plan.

The obvious reason why "person" was defined so as to include a state was that Congress intended to regulate state pollution-causing activities in the same manner as private pollution-causing activities. Thus, if a state owned an incinerator or a fleet of motor vehicles, those sources must conform to otherwise valid federal standards. Nothing in the Clean Air Act, however, suggests that the Administrator could force the states to govern the pollution-creating activities of others as he directs, and fine or imprison state officials should they refuse. The reason such sanctions cannot be imposed on a state is not because the state fails to qualify as a "person," but because the inability or unwillingness of a state to yield to the Administrator's dictates is not a "violation". The Administrator was never empowered to make such demands.

In short, the argument that Congress left such a coercive and unprecedented intent lurking within the

[55] 42 U.S.C. 1857h(e).

[56] Brief for the Federal Parties at 38-40.

definition of "person" cannot prevail. As the Ninth Circuit observed:

> "The Administrator had no difficulty in making clear his intention to impose sanctions on States not enforcing effectively implementation plans. Congress can be expected to have no less capacity for clarity.[57]

2. *No Valid Distinction Can Be Made Under The Clean Air Act Between Forcing The States To Legislate And Forcing The States To Administer EPA-Promulgated Transportation Control Programs.*

The Administrator, relying on the opinion of the District of Columbia Court of Appeals, seeks to find a distinction under the Clean Air Act between ordering the states to adopt particular statutes and ordering them to implement federal regulations, which implementation necessarily requires the adoption of auxiliary statutes or state regulations.[58] In *District of Columbia v. Train, supra,* the court found it permissible under the Clean Air Act for the Administrator to force the states to purchase a fleet of buses, install bus lanes, and to deny registration of vehicles which do not pass a federally administered inspection test. This holding is directly contrary to those of the Fourth and Ninth Circuits.[59]

The Administrator offers no rationale for this "distinction". The unpersuasive rationale of the District of Columbia Court of Appeals for holding that those

[57] *Brown v. Environmental Protection Agency,* 521 F.2d 827, 834 (9th Cir. 1975). *See, Hancock v. Train,* 96 S. Ct. 2006, 2022 (1976); *Friends of The Earth v. Carey,* 74 Civ. 4500 at 7-8, 9 ERC 1007 (S.D.N.Y., July 13, 1976).

[58] Brief for the Federal Parties at 20 n. 14, 36. *District of Columbia v. Train,* 521 F.2d 971, 987-988 (D.C. Cir. 1975).

[59] *See, e.g., Maryland v. Environmental Protection Agency,* 530 F.2d, 215, 229 (4th Cir. 1975); Brown v. Environmental Protection Agency, 521 F.2d 827, 831-832 (9th Cir. 1975).

programs are authorized by the Clean Air Act can be summarized as follows:

1) Upholding such orders "would not be directly contrary to the requirement in Section 110(c) that the Administrator, and not the states, promulgate the substitute regulations when state submitted plans are found to be inadequate." *Id.* at 987.

2) "[N]owhere in the Act is the Administrator specifically told that he lacks authority to force the states to administer the plan he has promulgated when the plan is directed to a traditional state function such as registering and licensing motor vehicles" *Id.*

3) The language of the Act is "broad enough" to encompass forcing the states to establish bus lanes and purchase bus fleets. *Id.* at 983.[60]

The States will demonstrate that the above reasons cannot survive scrutiny. Moreover, holding that the Administrator may not directly order states to legislate, but may indirectly do so by ordering them to achieve the results specified in the Administrator's regulations, making legislation inevitable, exalts form over substance.

a. All Of The Sections Of The Clean Air Act Must Be Read *In Pari Materia.*

One cannot conclude that the Clean Air Act mandates state enforcement of implementation plans merely because such a concept is not contrary to Section 110(c) of the Act. All of the sections of the Clean Air Act must be read *in pari materia.* By doing so, the structure, language and history of the Act reflect a congressional intent that the role of the federal government is to step in and take over control of air

[60] The case goes on to conclude from the legislative history that Congress intended the states to enforce an inspection and maintenance program.

pollution itself, should the states fail to act. It is submitted, therefore, that the court in *District of Columbia v. Train, supra,* did not go far enough in analyzing the Act by merely finding EPA's approach not in conflict with section 110(c).

b. No Valid Distinction Exists Between Directly Forcing The States To Legislate And Forcing Them To Enforce Federal Regulations Which Require Legislation.

The basis of the Administrator's "distinction", which he borrowed from the opinion of the District of Columbia Court of Appeals, is that ordering the states to enact a particular statute compels them to "fill in the details of the Administrator's regulations", while ordering them to implement federally imposed regulations does not. *Id.* at 987.

This, it is respectfully submitted, makes no sense. Under the Administrator's theory there is nothing, for example, which would prohibit him from announcing an extremely detailed program which a state is then ordered to establish by enacting legislation and regulations. The state would thus be spared the burden of "filling in the details," but this would not lend validity to the Administrator's action, as he concedes. On the other hand, if the Administrator promulgates a vague regulation which the state is required to enforce and under which it must enact auxiliary statutes or regulations to carry out, it would doubtless be necessary for the states to "fill in the details," even though they had not been directly ordered to enact statutes. Carrying out the mandates of federally imposed regulations, then, is just as intrusive into state sovereignty as requiring state legislation to "fill in the details."

The District of Columbia Court of Appeals prefaced the drawing of this distinction with the caveat that

there may "arguably" be a difference and noting that it may be "argued" that the states can be ordered to take action to implement the federally imposed regulations. *Id.* at 987. It appears that the court was not adopting these positions for itself, but merely indicating that such positions can be "argued." While there is nothing offensive in noting that these positions are "arguable," the court never concludes that the argument has merit. Rather, it was assumed that the arguments were meritorious, thus enabling the court to reach the constitutional issues.

This peculiar approach is directly contrary to the canon which that court announced at the beginning of its opinion:

> In keeping with the general policy of federal courts that constitutional questions should be avoided if the case can be decided on statutory grounds, see *Rescue Army v. Municipal Court,* 331 U.S. 549, 568-69, 67 S. Ct. 1409, 91 L. Ed. 1666 (1947), we shall first consider petitioners' claim that the Clean Air Act does not authorize the EPA to require the states to enact laws or administer and enforce implementation plans. *Id.* at 981.

It is unclear why the court did not follow through on its promise to do just that. We urge this Court to do so.

c. The Failure Of The States To Regulate Is Not An "Indirect Source" Of Air Pollution.

Superimposed upon the "distinction" the Administrator perceives between ordering the states to legislate directly and ordering them to do so indirectly is the equally untenable proposition that the States, because they are owners and operators of the public highways, are polluters and may be forced to regulate and abate the pollution of others "like any other owner-operator of a pollution source."[61] In advancing this proposition, the

[61] The States take the view that direct pollution by the state from a stationary source, such as an incinerator, may be the subject of EPA sanction. But it is not pollution of that type which is the subject of this litigation.

Administrator stretches well beyond the breaking point the theory of the District of Columbia of Court of Appeals, analyzed above.

Assuming for the moment that somehow bus purchases and bus lanes, or the lack thereof, are "indirect sources of pollution,"[62] for which the States bear responsibility under the statute, it does not follow that the Administrator may force the States as "polluters" to regulate by requiring them to undertake inspection and maintenance programs. The remedy, if any, would be direct federal regulation of that pollution, rather than a federally announced requirement that the State undertake such regulation.

More fundamentally though, the Court of Appeals' theory, even as to bus purchases and bus lanes, falls of its own weight:

> The streets and highways and bus systems of the states are not being regulated by the Administrator as direct emitters of pollution but rather as factors which influence the use of pollution sources by other parties. We believe that these state-owned transportation systems are analogous to the railroad operated by the state in *United States v. California, supra.* This situation is similar to

[62] Nowhere in the Clean Air Act do the phrases "direct" or "indirect" sources appear, despite the Administrator's repeated reliance on them in his brief, nor is this distinction developed in the regulations promulgated thereunder. The potential for confusion caused by the introduction of this terminology is best illustrated by the disarray on this point found in the Administrator's own brief. At pages 21 through 25 (particularly page 23), the Administrator quotes himself at length and in the space of one paragraph describes roads, freeways and parking facilities first as "direct" and then as "indirect" sources of air pollution. Perpetuating this confusion, at page 29 of his brief, the Administrator now characterizes highways and parking garages as "State-owned indirect sources."

> federal statutes passed in the 1890's requiring the railroads to operate safe trains. *District of Columbia v. Train, supra* at 989.

The puzzling aspect of this reasoning is best identified in an excerpt from *Friends of the Earth v. Carey, supra* n. 57 at 1017 (citizens' suit on remand from Court of Appeals for the Second Circuit to enforce compliance with New York's Metropolitan Transportation Control Plan):

> The [District of Columbia] court's upholding the requirements relating to the construction of bus lanes and purchase of additional buses merits special attention. Clearly, the buses themselves are not being regulated as direct polluters since the addition of buses to the fleet could only mean additional emissions from this source. The bus system would not even appear to be a true indirect source of pollution since it in no way encourages private automobile operation. The logical question that follows is could a private bus company be ordered by the Administrator to purchase additional buses.
>
> It would appear that the bus system must have been seen as a useful tool in discouraging automobile traffic which tool happened to be in the hands of the state. Whether or not such a tool, however useful, is subject to federal regulations which impose affirmative action requirements as opposed to negative restraints is raised here only as an aid to examining New York's TCP.

The major purposes of the states' system of licensing vehicles and operators are safety, revenue collection and identification of vehicles. Nevertheless, the Administrator, through another of his leaps in logic, submits that the states' system of "licensing vehicles and operators" has somehow "encouraged the growth of automobile use to its present levels."[63] Moreover, it is the absence of an inspection and maintenance aspect from that system which is alleged to be particularly

[63] Brief for the Federal Parties at 22.

offensive. Once again, the Administrator is not directing his attention toward pollution-creating activities of states and continues to ignore his announced constraint that "the power asserted by the Administrator is only over the State as polluter, not over the State as a State."[64]

To make his argument more palatable, the Administrator seeks to narrow his classification of the states to include them with any other private owner-operator of a pollution-creating source. He insists that a state may be forced to act only to the extent it is responsible for the pollution and "only when its responsibilities stem, not from the mere failure to regulate private activities, but from its ownership and control of the facilities used in the process of contamination of the air."[65] The Administrator, however, is hard put to explain how forcing the states through their police power to conduct inspection and maintenance programs and to coerce their own citizens to participate in such programs can be rationally linked to their essentially neutral role in owning and operating the roads.

The Administrator's final stratagem is that the states are operating a pollution-creating source "by providing a system of traffic laws."[66] How can traffic laws encourage pollution except under the theory that, in the absence of such laws, citizens would be hesitant to drive automobiles, would leave them at home and would, therefore, cause less pollution?

The major fallacy in all of the Administrator's gyrations is that he seeks to characterize the state as an ordinary operator of an "indirect source" of pollution, but with this as his sole premise, he seeks to force the states to use their police powers as sovereign to regulate

[64] *Id.* at 20.

[65] *Id.*

[66] *Id.* at 22.

the activities of those other than themselves. The Administrator in the retreat described earlier, *see* p. 18, *supra*, now admits that he cannot do this directly.[67] It is submitted that neither can he do this indirectly by stretching his concept of "indirect source" beyond all coherent recognition. If Congress had intended to alter fundamentally our federal system and authorize a federal employee to force the states to exercise their police powers, it would have plainly endeavored to do so. Rather we are asked to extract such an intent from a strained and labyrinthine rationale.

To shore up his extraordinary statutory construction theories, the Administrator relies on several cases. These cases share a common irrelevance: they do not relate to the definition of congressional intent in the Clean Air Act. It does not advance this inquiry one whit to argue that in some other context Congress unequivocally undertook to regulate some arguably "indirect" phenomenon. If any significance can be attached to these cases, it is that in them Congress clearly articulated its intent. Congress must not now be presumed to have attempted to appropriate the police powers of the states by strained inference.

The Administrator first relies, as did the District of Columbia Court of Appeals, on *United States v. California,* 297 U.S. 175 (1936), for the proposition that, just as Congress may require state-owned railroads to comply with federal safety regulations, it may order states to see that private automobiles comply with federal pollution requirements.[68] The problems with this analysis are manifold: 1) the states there were not being asked to regulate the unsafe conduct of others; 2) Congress was not attempting to command the exercise of the states' police power in a particular way; and 3) the congressional intent was unequivocal.

[67] *Id.* at 20, n. 14.

[68] *Id.* at 22; *District of Columbia v. Train, supra* at 989.

The Administrator relies upon *United States v. Northwestern Pac. R. Co.,* 235 Fed. 965 (N.D. Calif., 1916), for the concept that those who provide transportation facilities for use by others may be charged with controlling the manner in which such facilities are used. In that case the court held that a railroad company which owned tracks could be held responsible for unsafe cars being hauled on those tracks, under a statute which forbade railroads from "permitting to be hauled or used on its line any car in violation of" federal safety requirements.[69] Again in that case, 1) Congress spoke plainly and unequivocally; 2) it was not speaking to a state and, therefore, 3) that case did not involve commands that state police powers be used in a particular way. Also relied upon is a statute forbidding airlines from transporting persons unless those persons agree to the conduct of security inspections.[70] For the same reasons stated above, the existence of such a statute leads to no inference relevant to this case.

For identical reasons, *Griggs v. Allegheny County,* 369 U.S. 84 (1962), upon which the Administrator relies, is not relevant to this case.[71] In that case the Court held that airport owners could be held financially accountable for constitutional "takings" caused by noise emanating from airplanes using their facilities. That case does not involve congressional commands that the states exercise their police powers in any particular way, nor did it involve any feats of prestidigitation with congressional intent: in fact, no statute was involved.

Finally, *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972),[72] a nuisance case dealing with municipal sewage discharges, treats only the narrow federal jurisdictional issue and is not on point. It does not relate to an

[69] Brief for the Federal Parties at 25 n. 17.

[70] *Id.*

[71] *Id.* at 25-26.

[72] *Id.* at 26.

inquiry into congressional intent with regard to the Clean Air Act, nor does it even hint at the proposition that Congress, or a court applying the doctrine of nuisance for that matter, can force a state to exercise its police power to regulate the pollution-causing activities of others.

A final problem with the Administrator's "indirect source" argument is that it knows no rational bounds, certainly not those the Administrator has set for it. If, indeed, an "indirect source" is a facility that encourages pollution by serving as an attraction to or convenience for pollution sources, it can be said with equal force that the states may be forced to regulate stationary sources, the siting and construction of which are encouraged by states and their political subdivisions through land use and tax policies, other incentives and, in some instances, through absence of regulations. In constructing his maze, then, the Administrator draws a distinction without a difference between "indirect sources" arising from mobile sources and those arising from stationary sources.

d. There Is Simply No Persuasive Evidence Of Congressional Intent To Invade A Traditional State Function.

Concerning the Administrator's licensing prohibition, the court in *District of Columbia v. Train, supra,* noted that ". . . the specific language of the Act suggests that Congress did not confer such authority any more than it intended that the states would be ordered to adopt statutes." *Id.* at 987. The court continued however:

> On the other hand, nowhere in the Act is the Administrator specifically told that he lacks authority to force the states to administer the plans he has promulgated when the plan is directed to a traditional state function such as registering and licensing motor vehicles. *Id.*

> The court reasoned that where the Administrator invades a traditional state function, in the absence of a specific prohibition, there is a presumption that Congress intended that invasion. Actually, the presumption, carefully developed by this Court, is just the opposite, namely that, in the absence of a clear congressional intent to preempt state prerogatives, the action by the state is not to be regarded as inconsistent with an act of Congress, and the reserved power of the state is thus to be preserved.

Any presumption of congressional intent to regulate state activities, such as that asserted by the Administrator, contravenes the traditional application of the Supremacy Clause in areas of potential federal-state conflicts. As was stated long ago by this Court, in *Missouri, Kansas & Texas Ry. v. Haber,* 169 U.S. 613, 623 (1898):

> . . . [It is the] settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.

The Court has more recently restated and reaffirmed this precept in *Florida Lime and Avocado Growers v. Paul,* 373 U.S. 132, 142 (1963):

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

See also, Head v. New Mexico Board, 374 U.S. 424, 430 (1963).

The statutes and regulations before the Court here fail to meet either of the *Florida Lime* tests. First, the

state activities in question are not in conflict with the enforcement of a federal statute or regulation. When a state registers a vehicle, such an act indicates no more than compliance of that vehicle with specified state requirements, typically concerning ownership, taxes, and safety. It does not permit operation of a vehicle in violation of federal requirements. Accordingly, there is no conflict, inasmuch as the operator must comply with both federal and state law. Second, as the Court acknowledged in *District of Columbia v. Train, supra* at 987, the Clean Air Act contains no unmistakable expression that state registration laws are preempted or otherwise void unless they apply the federal inspection standards.

The presumption in question is particularly well established when the regulated activity lies within the domain of traditional state police power. This Court has said:

> The settled mandate governing this inquiry, in deference to the fact that a state regulation of this kind is an exercise of the 'historic police powers of the States,' is not to decree such a federal displacement 'unless that was the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230.

Florida Lime and Avocado Growers, Inc. v. Paul, supra at 146.

In applying the presumption specifically to the Commerce Clause this Court has stated:

> As a matter of statutory construction Congressional intention to displace local laws in the exercise of the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especially the case when public safety and health are concerned. *Kelly v. Washington,* 302 U.S. 1, 10-14; *H.P. Welch v. New Hampshire,* 306 U.S. 79, 85 and cases cited.

Maurer v. Hamilton, 309 U.S. 598, 614 (1940).[73]

Finally, and most specifically, this Court has recognized that the states' exercise of the police power to control their streets and highways, including the registration of vehicles, falls squarely within the accepted doctrine.

> In [*Hines v. Davidowitz,* 312 U.S. 52], a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field any 'concurrent state power that may exist is restricted to the narrowest of limits.' p. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally *local matters* as public safety and order and the *use of streets and highways. Maurer v. Hamilton, supra,* . . . We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard.

Allen-Bradley Local v. Board, 315 U.S. 740, 749 (1942) (emphasis added).

Thus, state regulatory activities, especially those traditionally of concern to the states, are not deemed to be superseded by federal law, absent some clear and unmistakable evidence. For when Congress intends to

[73] Likewise in *Hancock v. Train, supra* n. 57 at p. 35, a state was suing to compel a federal facility to comply with the terms of the state's implementation plan. This Court refused to bind the federal facilities to the procedural elements of the plan in the absence of Congress having expressed "with satisfactory clarity" an intention to bind the United States.

intrude upon state regulatory authority it knows how to do so. For example, section 116 of the Act[74] states, in part:

> [T]hat if an emission standard limitation is in effect under an applicable implementation plan . . . such state or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard of limitation made under such plan . . .

The states' longstanding regulation of motor vehicles and their licensing should not be subject to the imposition of a conflicting federal regulation in the absence of clear congressional intention to override state regulatory activities. Recognition of the states as repositories of all powers not surrendered to the federal government is consonant with the prior decisions of the Court and, therefore, compels the conclusion that the presumption of undiminished state regulatory power should be applied in this case.

Congress has traditionally recognized the presumption of validity of state regulations by seeking to reconcile federal-state conflicts rather than to exacerbate them.

In *Maryland v. Environmental Protection Agency, supra* at 228, the Court of Appeals for the Fourth Circuit referred to the typical congressional enactment, which has as its purpose the replacement of a state program by a federal one, as the "alternative whip of economic pressure and seductive favor." This concept has also been commonly referred to as the "carrot-and-stick" approach. Examples of this method of legislation are legion, and the Fourth Circuit summarized well Congress' use of this economic inducement approach in the following illustrative situations: the withholding of federal funds for a state's failure to comply with the Hatch Act or the Highway Beautification Act; the

[74] 42 U.S.C. 1857d-1.

withholding of federal project approval for failure to adopt a 55 m.p.h. speed limit or failure to follow federal standards under the Occupational Safety and Health Act. *Id.*

When legislating in an area in which the states are known to have prominent regulatory programs in place, traditionally Congress has been loathe to intervene and to federalize the area entirely. Instead, it has used economic incentives to achieve those purposes. Consequently, presumption of an intent to override a state program, particularly in an area of traditional state police power activity such as motor vehicle registration, is wholly inconsistent with the historical approach of Congress.

D. The Legislative History Of The 1970 Amendments Is Devoid Of Congressional Intent To Force The States To Adopt Statutes Or To Administer And Enforce Implementation Plans.

As previously submitted, Congress has never contemplated authorizing federal officials to require the states to exercise their police powers in a particular manner. Bearing in mind that the Clean Air Act imposes both civil and criminal sanctions on violators, it is inconceivable that such a novel and radical assumption of power by a federal official could have been intended through any abstract interpretation of the Clean Air Act.

One searches the legislative history of the Clean Air Act in vain for even the most oblique mention of jail, injunctions or fines to be visited upon state governors, legislators, or agency officials, or any other punitive actions being taken against a state for failure to carry out the dictates of the Administrator. The only mention of the failure of the states to follow the Administrator's directions is in the context of the Administrator himself assuming the enforcement of his plan. The legislative history is, thus, entirely consistent with the structure

and language of the Act, as analyzed above. The Administrator has failed to produce any support in this history for his broad assertion of power over state activities.[75] As the Ninth Circuit Court of Appeals stated in *Brown v. Environmental Protection Agency*, *supra* at 834:

> A diligent search of the sections of the Clean Air Act fails to reveal a single instance in which Congress explicitly has vested in the Administrator power to compel the states to administer and enforce regulations promulgated by him designed to govern polluters, potential or actual, other than the state, municipality, or political subdivision of the state. Counsel for the Administrator also have been unable to guide us to such a provision . . . .

All that the Administrator puts forth in his brief with respect to the legislative history of the 1970 Act is one part of a paragraph citing references which are not particularly helpful to either this Court or to his cause. Furthermore, the more expansive footnote to that part adds nothing but obfuscation to the issues under discussion.[76]

The Administrator then turns the clock forward four years to rely on what he characterizes as "subsequent" legislative history supporting a congressional intent to coerce the states to do the Administrator's bidding, yet his examples manifest no such intent. First, the Administrator argues that "Congress has acted to bar promulgation of particular transportation control measures; but the general strategy of requiring States to implement such measures, where necessary, was left unaltered."[77] This argument begs the question, assum-

[75] Excerpts from the legislative history of the Clean Air Act which illustrate that Congress never considered coercing the States to enact laws and regulations and to enforce federal programs are set forth in Appendix C *infra*.

[76] Brief for the Federal Parties at 32-33 n. 26.

[77] *Id.* at 33-34.

ing as it does that Congress intended to mandate a "general strategy of requiring States to implement such measures" which it declined to change. Moreover, the sole example given is restrictions Congress placed in the 1974 Act on the Administrator's power to impose parking surcharges and limitations.[78] The states were not involved in this program. This was not an area where Congress could have been expected to address itself to the issue of state coercion or would approve coercion by its silence. The Administrator points to an amendment reserving to the states the right to impose parking restrictions, but, far from supporting the Administrator's view, this merely manifests Congress' traditional policy of *not* interfering with the exercise of the police powers of the states.

Finally, the Administrator seeks refuge in the deletion, in conference committee, of a provision in an amendment which would have prohibited the Administrator from establishing bus/carpool lanes. The Committee is quoted to the effect that the deletion "would therefore continue to permit preferential bus/carpool lanes to be implemented by the Environmental Protection Agency . . ."[79] Although there is reference to the statutory language discussed above, to the effect that "the basic responsibility rests with State and local governments," there is no language supporting the power of the Administrator to force the states to act, as opposed to establishing such bus/carpool lanes himself in instances where the states fail to discharge their "primary responsibility." The committee avoided direct confrontation on this score with the statement that "the conferees do not intend to question . . . the authority of the Administrator of the Environmental Protection Agency to impose, [sic] transportation control plans."[80]

[78] *Id.* at 34.

[79] *Id.* at 35.

[80] *Id.* at 36.

E. The Status Of The District Of Columbia Under The Clean Air Act.

For purposes of the Clean Air Amendments of 1970 the District of Columbia is treated as a state.[81] However, the legal relationship between the federal government and the District of Columbia differs sharply from that of the federal government and the fifty states. *Palmore v. United States,* 411 U.S. 389 (1973). Article I, Section 8, Clause 17 of the Constitution grants exclusive and plenary legislative authority to Congress over the territory that became the District of Columbia.

The legislative authority of Congress over the District of Columbia includes all legislative powers which a state may exercise over its own affairs. *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953). The legislative authority of Congress over the District of Columbia also includes its national legislative powers under the Constitution which are not shared by the fifty state legislatures. For example, Congress may enact legislation for the District of Columbia which includes the regulation of commerce among the several states whereas state legislatures have very limited legislative powers to regulate commerce. *Neild v. District of Columbia,* 110 F.2d 246 (D.C. Cir. 1940).

Congress also has the power to delegate portions of its legislative authority over the District. It has exercised that authority over the District by making the District a body corporate for municipal purposes by law, Section 1-102, D.C. Code, 1973 ed., and has delegated portions of its legislative authority over the District to legislative bodies in the District. The delegation of legislative authority by Congress to the Legislative Assembly of the District over "rightful subjects of legislation"[82] was as broad as the traditional

[81] 42 U.S.C. 1857h(d); Clean Air Act §302 (d).

[82] Organic Act of 1871, Act of February 21, 1871, Section 1 *et seq.*, 16 Stat. 419.

police power of a state. *District of Columbia v. John R. Thompson Co., supra.*

Congress has delegated regulatory authority to the Government of the District "to protect and enhance the quality of the District of Columbia's air resources." Section 6-811 D.C. Code, 1973 ed. That Congress was mindful of existing federal air pollution legislation at the time of this delegation is evident since it specifically cited portions of that legislation in the vehicle of delegation, the District of Columbia Air Pollution Control Act of 1968. Section 6-812(a)(4), D.C. Code, 1973 ed. However, within that delegation, the Congress did not also delegate legislative authority over this subject in the District to the Administrator of the Environmental Protection Agency or to any other federal agency. It only required that regulations adopted by the District in the exercise of this delegation be at least as stringent as recommendations already made by the Secretary of Health, Education and Welfare, the predecessor of the Administrator. Section 6-812(a)(2), D.C. Code, 1973 ed.

Congress, in constructing a legislative program for air pollution abatement, has not sought to delegate any portion of its legislative authority over the District by delegating portions of that authority to any federal agency or administrator. When Congress undertook its most recent revision of its delegation of legislative authority over the District in the District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. 93-198, 87 Stat. 774, it did not delegate portions of that legislative authority to any federal agency or administrator nor did it qualify its delegation therein to the new District of Columbia Council so as to require review of Council actions by any federal agency, reserving that role for itself.

Thus, when it is said that the District is treated as a state for Clean Air Act purposes, it is essential to recognize that whether the District is a "state" or "state

or territory" within the meaning of any particular statutory or constitutional provision depends on the character and aim of the specific provision involved. *District of Columbia v. Carter,* 410 U.S. 418, *reh. den.,* 410 U.S. 959 (1973).

For purposes of the Clean Air Act and the D.C. Air Pollution Control Act of 1968, the Congress has delegated some regulatory authority and legislative authority to the District Government and has reserved the balance of that authority to itself just as the states have given limited legislative powers to the United States and have reserved the balance of those powers to themselves and to the people in the Tenth Amendment. Congress has made no delegation of its legislative jurisdiction over the air resources of the District of Columbia to the Administrator of the Environmental Protection Agency. By analogy with the reasoning of the Court in *Palmore v. United States, supra,* we may assume that Congress legislated with care, and that had it intended to delegate to the Administrator of the Environmental Protection Agency the authority to order the adoption of certain laws by the Council of the District of Columbia, it would have specifically done so, and not left so important a matter to implication. Consequently, any attempt by the Administrator to exercise such legislative authority or to *require* that actions be taken by the District of Columbia Council is clearly unlawful.

III.

THE ADMINISTRATOR LACKS THE POWER UNDER THE CONSTITUTION OF THE UNITED STATES TO REQUIRE THE STATES TO ENACT LAWS AND ISSUE REGULATIONS ESTABLISHING AIR POLLUTION CONTROL PROGRAMS.

The Administrator's regulations ordering the states to enact legislation and regulations establishing air pollution control programs and to fund and enforce

those programs stand as an unprecedented exercise of federal power. During the entire course of our constitutional history, no act of Congress or order of a federal executive officer has sought to coerce the states to exercise those essential sovereign powers under threat of civil and criminal sanctions.[83] The Administrator finds no support in the logic and structure of the Constitution, in history or in any decision of this Court for the entirely novel constitutional theories on which rests his assertion of the power to conscript the legislative and executive powers of the States.

A. A State's Exercise Of Its Governmental Powers Is Not Commerce Or An Activity Affecting Commerce Subject To Federal Regulation Under The Commerce Clause.

Since Chief Justice Marshall's seminal decision in *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824), this Court has given broad recognition to the "embracing and penetrating"[84] power of Congress to regulate both private and state governmental activities that affect interstate commerce. However, the decisions of this Court have always recognized a limitation on that power imposed by the very words of the Commerce

[83] Indeed, the States have discovered only two instances in which similar exercise of power was even contemplated by the federal government. The drafters of the Emergency Price Control Act of 1942 considered requiring the state courts to enforce the criminal provisions of that Act, but the constitutionality of the proposal was considered to be so doubtful that it was dropped. Hart and Wechsler, *The Federal Courts and the Federal System* 437 (Rev. ed. 1973). The Federal No-Fault Automobile Insurance Act, S. 354, 93d Congress, would have required state officials to act under and administer a federal program. Attorney General Levi expressed the view that such coercion would be unconstitutional. See p. 66 *infra.* *See* Salmon, *The Federalist Principle: The Interaction of the Commerce Clause and the Tenth Amendment in the Clean Air Act, 2 Colum. J. of Env. Law* 290, 295 n. 23, 327-341 (1976).

[84] *Wickard v. Filburn,* 317 U.S. 111, 120 (1942).

Clause itself. Mr. Chief Justice Hughes defined that limitation as follows:

> The subject of the federal power is still 'commerce' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains.

Santa Cruz Fruit Packing Company v. NLRB, 303 U.S. 453, 466 (1938).

This Court must, of course, make the ultimate determination that a particular activity being subjected to federal regulation is commerce, or has a substantial effect on commerce in the constitutional sense.

The subject matter limitation on federal power under the Commerce Clause poses a particularly difficult problem for the Administrator in this case. He has determined that the direct federal development, implementation, and enforcement of transportation control strategies is expensive, impractical and inefficient. Consequently, he has ordered the States to undertake those actions, and his regulations operate directly and deliberately on the State's governmental powers to make and enforce laws and regulations.

For this Court to sustain his regulations, the Administrator must establish that the activities which he seeks to regulate are commerce or that they affect commerce in the constitutional sense. Yet he acknowledges,[85] as indeed he must, that "the power of the states over commerce has no more been recognized as commerce than has the power of Congress which is derived from the Commerce Clause." *Brown v. Environmental Protection Agency, supra* at 839. To escape this dilemma, the Administrator relies on what he terms a fundamental principle, namely that the States' owner-

[85] Brief for the Federal Parties at 19.

ship and operation of the roads is a "pollution creating activity" affecting commerce and thus is a proper subject of federal regulation.

For reasons that have already been discussed at some length in this brief,[86] the Administrator's "fundamental principle" is in reality no more than an empty fiction. It represents a thinly veiled attempt to alter the constitutional nature of the activities he seeks to regulate by changing the words he uses to describe those activities. In fact, the States own and operate the public highways only by exercising their governmental powers, and, as the Administrator himself has recognized, by "the regulatory, taxing and investment decisions made at all levels of government."[87] The Administrator concedes though that those uniquely governmental decisions are not subject to the federal commerce power. His argument collapses from internal contradictions the moment he states it.

The particular state activities which the Administrator alleges to be pollution-causing are the ownership and operation of public highways. The term "operation", as used by the Administrator, apparently includes the licensing of vehicles, the enactment of traffic laws, and the creation and maintenance of a "transportation system" which has encouraged the use of "single-passenger automobiles", instead of mass transit.[88] Stripped of its disguises, the Administrator's position is that the failure of the States to enact and enforce laws and regulations to reduce air pollution from privately owned motor vehicles is the "pollution creating activity" subject to federal regulation. He finds no support whatsoever in any decision of this Court for the proposition that failure of a state to exercise its

[86] *See* Argument II C, pp. 38-44 *supra*.

[87] 38 Fed. Reg. 30632 (November 6, 1973); Brief for the Federal Parties at 21.

[88] Brief for the Federal Parties at 22.

police power is an activity "affecting commerce" within the meaning of the Constitution. To the contrary, the reasoning of this Court in all of the cases involving Congress' regulation of state activities lends no support to the Administrator's position.

On several occasions this Court has upheld the power of Congress under the Commerce Clause to regulate certain state activities.[89] The common denominator of all of those cases is that the state activity subject to direct regulation was identical to economic activity carried on by private persons or enterprises.

Maryland v. Wirtz, 392 U.S. 183 (1968), stands as the highwater mark of this Court's recognition of congressional power to regulate state activities under the Commerce Clause. Although this Court overruled "the far-reaching implications" of *Wirtz* last term in *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976), it should be noted that even the expansive view of congressional power over state activities expressed in *Wirtz* quite clearly did not embrace the notion that the exercise of legislative and executive powers by the

[89] *Board of Trustees v. United States*, 289 U.S. 48 (1933) (a state university can be required to pay the federal duty on imported scientific equipment); *United States v. California*, 297 U.S. 175 (1936) and *Parden v. Terminal Railway Company*, 377 U.S. 184 (1964) (upholding, respectively, the application of the Federal Safety Appliance Act and the Federal Employers Liability Act to state-owned railroads); *United States v. Ohio*, 385 U.S. 9 (1966) (reversing *per curiam*, citing *Wickard v. Filburn*, 317 U.S. 111 (1942), a decision of the Court of Appeals for the Sixth Circuit holding that farms operated by Ohio's mental and penal institutions were not subject to the acreage limitations imposed on private farms by the Agricultural Adjustment Act); *Maryland v. Wirtz*, 392 U.S. 183 (1968) (upholding the 1961 amendments to the Fair Labor Standards Act extending the minimum wage and maximum hour provisions of that Act to employees of state operated institutions and schools); *Fry v. United States*, 421 U.S. 542 (1975) (holding that state employees were subject to wage and salary controls imposed by the Economic Stabilization Act of 1970).

states, or their failure to exercise those powers, is commerce or an activity affecting commerce subject to regulation under the Commerce Clause. Justice Harlan's opinion for the majority carefully marked out the limits imposed by the words of the Commerce Clause itself. He expressly rejected the dissenting opinion's suggestion that Congress could find that all state activities, such as the state budgeting process, affect commerce and were subject to federal control under the commerce power. 392 U.S. at 196 n. 27. He further stated that:

> . . . while the commerce power has limits, valid regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaged in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. . . . [This court] will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses simply because the enterprises happen to be run by the States for the benefit of their citizens. *Id.* at 196-99.

Wirtz thus recognized that commerce and activities affecting commerce to which Congress can address its power are limited to those activities which can be engaged in by both state-owned enterprises and privately owned enterprises or private individuals. If private enterprises cannot engage in a particular kind of activity, or conversely, if a particular activity is uniquely governmental, it is not commerce in the constitutional sense.

The decisions of this Court dealing with the implied immunity of the states from taxation by the federal government support the proposition that activities which are uniquely governmental in nature are not subject to regulation under the Commerce Clause. Although the exact scope of the state's immunity from

federal taxation has at times provoked disagreement among members of this Court, even those members who have formulated the immunity in the most narrow terms have agreed that state activities which are exclusively governmental in nature cannot be taxed by the federal government. For example, in *New York v. United States,* 326 U.S. 572 (1946), the Court held that New York's sale of mineral water was not immune from federal taxation. Justice Frankfurter's opinion, joined in by Justice Rutledge, described this most restrictive interpretation of the states' immunity as follows:

> There are, of course, State activities and State owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned *and not uniquely capable of being earned only by a State,* the Constitution of the United States does not forfeit it merely because its incidence falls also on a State. *Id.* at 582 (emphasis added).

The activities that are the subject of the Administrator's regulations in this case are uniquely governmental in nature. Only governments own and operate public highways[90] and they do so only by exercising governmental powers. Only governments enact laws, appropriate public funds, adopt regulations, and enforce laws to regulate the activities of private citizens. There is simply no counterpart to those activities in the private

[90] *See generally, South Carolina v. Barnwell,* 303 U.S. 177 (1938); *Morris v. Duby,* 274 U.S. 135 (1927); *California v. Central Pacific Railroad Company,* 127 U.S. 1, 40 (1888) ("No private person can establish a public highway"). *Barnes v. District of Columbia,* 91 U.S. 540 (1876); *Pennsylvania v. Environmental Protection Agency,* 500 F.2d 246, 262 (3d Cir. 1974).

sector. "Certainly the paradigm of sovereign action — action qua state — is the enactment and enforcement of state laws." *National League of Cities v. Usery, supra* at 2485 (Brennan, J., dissenting). Thus, those activities are not commerce or activities affecting commerce subject to regulation by the federal government under the Commerce Clause.

A constitutional definition of commerce or activity affecting commerce must be in consonance, not with some abstract metaphysics of causation and effect, but with the fundamental purposes of the Constitution and the structure of our federal system. The Administrator's central thesis, that state governmental policy decisions with respect to public highways and the failure of the States to exercise their governmental powers in the prescribed manner constitute burdens on interstate commerce, runs counter to both the history and the structure of the Constitution. The Constitution contemplates that the federal government will have the power to regulate interstate commerce, not by distorting the meaning of that term to include the governmental powers of the states, but by acting directly on individuals, by preempting state action where it conflicts with the federal purposes and by conditioning state regulation on compliance with federal requirements.

B. The Administrator's Regulations Interfere With Governmental Functions That Are Essential To The Separate And Independent Existence Of The States, And Thus His Regulations Violate State Sovereignty Protected By The Constitution Of The United States.

In *National League of Cities v. Usery, supra,* this Court held that the states' power to determine the wages and hours of their employees was a "function essential to separate and independent existence," 96 S. Ct. at 2471, and it declared invalid the minimum wages

and maximum hours provision of the Fair Labor Standards Act as applied to the states because those provisions "directly displaced the states' freedom to structure integral operations in areas of traditional governmental functions." *Id.* at 2474. The Administrator's regulations at issue in this case represent a much more serious interference with integral governmental functions than did the federal legislation before the Court in *National League of Cities*. By commanding the states to exercise their legislative and executive powers and to exercise them in a particular manner, the Administrator's regulations displace not only important state policy decisions but also the essential processes of state government.

The initial decision to establish a particular program, such as an emission inspection and maintenance program or a program to provide additional public transportation facilities, is the essence of independent government. No attribute of sovereignty is more fundamental to the states' integrity and to their "ability to function effectively within a federal system." *Fry v. United States*, 421 U.S. 542, 547 (1975).[91]

Even under the provisions of the Fair Labor Standards Act Amendments declared invalid in *National League of Cities*, the states retained at least an element of choice. That Act required the states to pay their employees certain wages, and faced with that requirement the states made policy decisions concerning the delivery of governmental services that they otherwise might not have made. But the states still had the power to decide to hire or not to hire additional employees or to let their employees work overtime. In contrast, under the Administrator's regulations, the states are deprived of all choice. Instead, they must establish the program

[91] *See also*, Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 Harv. L. Rev. 1871, 1871-91 (1976).

and enforce it or be severely penalized. They cannot adopt the "'simple expedient' of not yielding." *Oklahoma v. United States Civil Service Commission*, 330 U.S. 107, 143 (1947).

The Administrator devotes his entire argument in support of his regulations to attempting to minimize their impact upon the states. He argues first that his transportation control strategies are narrowly drawn to affect only one aspect of the states' activities, their ownership and operation of the public highways and their transportation policies. Like most of the Administrator's arguments in this case, it is entirely an argument of convenience, conceived at the last possible moment and directly contrary to earlier positions. For example, in his general preamble to transportation control plans promulgated on July 24, 1973,[92] the Administrator characterized the task imposed on the states in very different terms. He commented:

> In requiring the State and EPA to impose transportation controls where they are needed to meet air quality standards, the Congress imposed a regulatory task whose difficulty and complexity are virtually unparalleled. (A. at 423).

Furthermore, this Court's reasoning in *National League of Cities* in no way suggests that only those exercises of Congress' power which affect *all* state governmental activities will constitute an unconstitutional intrusion into state sovereignty. If the Court had viewed a pervasive federal intrusion into and across the entire range of state functions as a prerequisite to a violation of state sovereignty, then *Maryland v. Wirtz, supra*, which involved application of the Fair Labor Standards Act to school and hospital employees, could have been limited to its facts. Instead *National League of Cities* overruled *Maryland v. Wirtz*, and the Court was careful to note that, with respect to specific state

[92] 38 Fed. Reg. 20769 (A. 406).

services, "each provides an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 96 S. Ct. at 2476. Finally, and most importantly, the underlying principle of *National League of Cities* is that with respect to traditional state governmental functions, the states retain the power to make basic policy decisions. If federal intrusion into all aspects of state government were required before Congress' power could be checked, then state sovereignty could simply be chipped away piece by piece.

The Administrator also emphasizes repeatedly that under the Clean Air Act the states have the first opportunity to specify the methods by which they will attain the ambient air quality standards. That argument, however, demonstrates the Administrator's failure to comprehend the principles underlying our federal system of government with which this Court was concerned in *National League of Cities*. Under the Administrator's regulations, the states only have options within the parameters of a federally dictated policy aimed at a particular problem. However, state governments, like the federal government, are faced with a myriad of difficult problems with respect to essential governmental functions, and they must make important policy decisions concerning how to allocate limited financial and human resources to deal with all of those problems. *National League of Cities* holds that Congress cannot exercise its powers under the Commerce Clause in attempting to solve one problem in such a way as to directly displace the states' ability to set their own priorities and make their own policy judgments with respect to the delivery of government services.

Contrary to the Administrator's representations to this Court, his transportation control strategies will impose substantial financial burdens on the States. For

example, a regular size forty-foot air conditioned bus now costs WMATA $72,000. The total cost of purchasing the 475 additional buses required by the Administrator's regulations would be over $34 million. In addition, the States and their political subdivisions will be required to appropriate funds to cover the inevitable operating deficits.

The Administrator's inspection and maintenance regulations will also require the States to engage in additional law enforcement functions. For example, those regulations require the States to conduct spot checks to ensure that the owners have not modified their motor vehicles so as not to comply with emission standards. Thus the States will be forced either to hire new enforcement personnel or to shift personnel assigned to enforce other state programs. Yet it is exactly that sort of relinquishment of policies with respect to governmental functions such as law enforcement that this Court held in *National League of Cities* to be beyond the power of Congress under the Commerce Clause.

The Administrator argues that his regulations are less intrusive than the alternative of having federal authorities themselves operate buses and inspect private vehicles. The Administrator again misunderstands the difference between physical intrusion and intrusion into the proper role of the states in our federal system. The presence of federal inspectors and bus operators would not be an institutional intrusion into the state role any more than federal post offices or FBI agents, all of which are present in the States. The States agree with the Attorney General of the United States who testified in response to a similar argument by Senator Moss at the hearings on the Federal No-Fault Insurance Act.

> But, Senator, assuming, as I do, the desire to do good in this area, of course, I think it is an

> insidious point to say that there is more federalism by compelling a State instrumentality to work for the Federal Government.
>
> That is a very enticing argument, it makes it easier for the Federal Government to encroach, it makes it easier to wipe out the sovereignty of the separate states.[93]

C. The History Of The Constitutional Convention Of 1787 Demonstrates That The Framers Of The Constitution Did Not Intend That The Federal Government Should Have The Power To Require The States To Enact Legislation Or To Administer And Enforce Federally Mandated Programs.

The regulations at issue in this case represent an attempt by the Administrator to appropriate by coercion the governmental powers of the states to solve a national problem. In the Administrator's own words, the regulations were promulgated "to provide the necessary assurance that state and local action would be forthcoming." 38 Fed. Reg. 30633 (November 6, 1973).

The States submit however that the framers of the Constitution emphatically rejected a system of government in which the central government had the power to act through the states to achieve its ends. Thus, the means chosen by the Administrator to solve the national problem of air pollution violates the entire spirit and purpose of the framers' efforts.

The crucial decision of the Constitutional Convention of 1787 was the decision to establish a central government having the power to act directly upon individuals and not merely upon the states. The purpose of that determination was to correct the major weakness of the Union under the Articles of Confederation, the lack of effective power in Congress. Under the

[93] Hearings on S. 354 before the Senate Committee on Commerce, 94th Cong., 1st Sess., Ser. 94-20, 496 at 503 cited in Salmon, *supra* n. 83 at 341.

Articles of Confederation, the Union was a league of states. It received its authority from the States and its laws were directed to the states. To the extent that Congress desired to regulate the affairs of individual citizens, it could only do so through the agency of the states. Although the states were bound in theory to comply with the laws of Congress, in fact they refused to do so, and Congress lacked the power to compel obedience.[94]

Alexander Hamilton described this fundamental structural flaw in the Articles of Confederation as follows:

> The great and radical vice in the construction of the existing Confederation is in the principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of which they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends. Except as to the rule of apportionment, the United States have an indefinite discretion to make requisitions for men and money; but they have no authority to raise either by regulations extending to the individual citizens of America. The consequences of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations, which the states observe or disregard at their option.[95]

James Madison and other delegates who convened in Philadelphia in May 1787 believed that the central government must have more power. Writing to Thomas

[94] *See generally*, Charles Warren, *The Making of The Constitution* 3-54 (1937 ed.).

[95] *The Federalist No. 15* at 93 (Cooke ed. 1961). *See also*, Madison, *Letters and Other Writings* 34 (Worthington ed. 1884).

Jefferson shortly before the Convention began, Madison indicated that he sought to achieve an increase in the power of Congress that would "render it efficient without the intervention of the Legislatures."[96]

Shortly before the Convention began, the Virginia delegation drafted a series of fifteen resolutions (the Virginia Plan) to provide a basic framework for consideration, and Governor Randolph opened the main business of the convention by introducing the Virginia Plan. The Sixth Resolution provided:

> 6. Resolved, that each branch ought to possess the right of originating acts; that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation; *to negative all laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the Articles thereof* (emphasis added).[97]

The fate of two of the clauses in the Sixth Resolution have a direct bearing on the constitutional issues presented to the Court by the Administrator's regulations. The last clause, authorizing the use of force by the national government against a delinquent state, was addressed only by Madison. His comments are significant:

> Mr. Madison observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it, when

[96] Madison, *Letters and Other Writings* 284 (Worthington ed. 1884).

[97] 1 Farrand, *The Records of The Federal Convention* 20-23 (Rev. ed. 1937).

> applied to people collectively, and not individually. A union of the states containing such an ingredient seemed to provide for its own destruction. The use of force against a state would look more like a declaration of war then an infliction of punishment; and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound. He hoped that such a system would be framed as might render this resource unnecessary and moved that the clause be postponed. This motion was agreed to *nem. con.*[98]

The third clause of the Sixth Resolution, which provided for a legislative negative endowing the national government with the power to veto state laws, also suffered defeat but only after protracted debate. The crux of the controversy was whether the power of the federal courts to declare state laws unconstitutional, a power which was for the most part unquestioned by the Convention,[99] served as a sufficient check on the power of the states. In the end, the issue was settled by the Convention's acceptance of the Supremacy Clause, coupled with the power of the judiciary to review state laws on constitutional grounds, as an effective substitute for the legislative negative.[100]

Not long after the Convention adjourned, Madison wrote to Jefferson describing what he thought was the essential "ground work" on which the proposed Constitution rested.

> "It was generally agreed that the objects of the Union could not be secured by any system found on the principle of a Confederation of Sovereign

[98] Madison, *Journal of The Constitutional Convention* 62 (Scott ed. 1893).

[99] *See generally,* Beard, *The Supreme Court and the Constitution* (1912); Hart and Wechsler, *The Federal Courts and the Federal System* 9 (Rev. ed. 1973).

[100] *See generally,* Farrand, *supra* n. 97 at 27-28; Warren, *supra* n. 94 at 16-17.

States. A voluntary observance of the federal law by all the members could never be hoped for. A compulsive one could evidently never be reduced to practice, and if it could, involved equal calamities to both the innocent and the guilty, the necessity of military force, both obnoxious and dangerous, and, in general, a scene resembling much more a civil war than the administration of a regular government.

Hence, was embraced the alternative of a government which, instead of operating on the states should operate without their intervention on the individuals composing them; and hence the change in the principle and proportion of representation.[101]

Hamilton argued the case for the adoption of the Constitution in similar terms in *The Federalist*. After presenting the need for a federal government having the power to act directly on individual citizens. Hamilton wrote:

To this reasoning it may perhaps be objected, that if any State should be disaffected to the authority of the Union, it could at any time obstruct the execution of its laws, and bring the matter to the same issue of force, with the necessity of which the opposite scheme is reproached.

The plausibility of this objection will vanish the moment we advert to the essential difference between a mere noncompliance and a direct and active resistance. If the interposition of the State legislature be necessary to give effect to a measure of the Union, they have only not to act or to act evasively, and the measure is defeated. This neglect of duty may be disguised under affected but unsubstantial provisions, so as not to appear, and of course not to excite any alarm in the people for the safety of the Constitution. The State leaders may even make a merit of their surreptitious invasions of it, on the ground of some temporary convenience, exemption, or advantage.

[101] Madison, *supra* n. 95 at 344.

But if the execution of the laws of the national government, should not require the intervention of the state legislature; if they were to pass into immediate operation upon the citizens themselves, the particular governments could not interrupt their progress without an open and violent exertion of an unconstitutional power. No omissions nor evasions would answer the end. They would be obliged to act, and in such a manner, as would leave no doubt that they had encroached on the national rights. . . .[102]

The framers' unequivocal rejection of a constitutional structure in which the central government possessed the power to force the states to enact and enforce laws to carry out its purposes emerges with undisputable clarity from the history of the Constitutional Convention and the ratification process. Faced with a compelling need to strengthen the central government, the framers briefly contemplated and emphatically rejected a solution granting the central government power to exercise coercive power directly against state governments. They rejected that alternative because they foresaw its potential for disrupting the relationship between the states and the federal government. For similar reasons, they declined to give Congress the power to nullify state laws.

Instead, the framers adopted a system in which the states retain broad governmental powers to act with respect to all subjects except those expressly prohibited in Article I, Section 10 of the Constitution. They clearly intended that the states retain the right to determine how and when to exercise their governmental powers free from any direct coercion by the federal government. To protect the primacy of federal law in the case of a conflict arising from the exercise of concurrent powers by the states and the federal government, the framers determined to rely on the Supremacy Clause and the

[102] *The Federalist No. 16* at 102 (Cooke ed. 1961).

judicial power to declare state laws invalid. They saw that there was a great difference between a constitutional structure in which the central government has the power to directly control, either by veto or affirmative command, the power of the states to legislate and exercise their governmental powers, and a constitutional structure which provides for the principle of federal supremacy and a mechanism for resolving actual conflicts of power. The Administrator's assertion of the power to require the states to enact and enforce laws and regulations ignores that fundamental structural difference.

The Administrator's regulations requiring the States to adopt, implement and enforce an inspection and maintenance program present a paradigm of that "great and radical vice" that the framers sought to avoid. Those regulations interpose the legislative and executive branches of the state governments between the federal government and solutions to the problem of air pollution. If the States are delinquent in establishing or enforcing the required program, the federal government must resort to drastic remedies such as placing certain state functions in receivership and imposing substantial civil penalties on state officials.[103] It is difficult to conceive of a regulatory scheme more disruptive to the federal system.

Similarly, the Administrator's regulations which require financial commitments for additional buses from WMATA buses from Maryland, Virginia and the District of Columbia resurrect the flaw inherent in the Articles of the Confederation. In order to ensure that the required contributions toward the purchase of buses are made, both Maryland and Virginia must enact legislation completely restructuring their respective relationships with WMATA and with their counties and

[103] See p. 12 *supra*.

political subdivisions. They must also pass legislation appropriating the necessary funds.

The framers learned after hard experience that a system, in which the federal government was dependent upon the states to carry out its purposes, was unworkable and disruptive. They created a system that makes coerced state participation both unnecessary and unconstitutional.

D. The Decisions Of This Court Have Consistently Recognized That The Federal Government Does Not Have The Power To Compel The States To Enact Laws, Adopt Regulations, Or Enforce Federally Mandated Regulatory Programs.

The early decisions of this Court reaffirmed the basic structural principle of the Constitution, that the federal government would have the power to act on individuals and not on the states. In *Hylton v. United States,* 3 U.S. (3 Dall.) 171, 178 (1796), Justice Patterson noted that "the fiscal power is exerted certainly, equally, and effectually on individuals; it cannot be exerted on States." Justice Iredell, who had been a member of the North Carolina ratifying convention, began from the same basic premise:

> The present Constitution was particularly intended to affect individuals and not States, except in particular cases specified. *Id.* at 181.

Two decisions of this Court which bear directly on EPA's assertion of power under the Commerce Clause to require the states to legislate are *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), and *Gibbons v. Ogden, supra.* In those two cases, Chief Justice Marshall made the first systematic exposition of the scope of federal power under the Commerce Clause and the Necessary and Proper Clause. *McCulloch v. Maryland* held unconstitutional a tax imposed by

Maryland on the Bank of the United States. In defining the relationship between the power of the federal government and the power of the states, Chief Justice Marshall emphasized that the framers of the Constitution intended that the federal government would have the independent power to achieve its purposes and would not have to rely on the powers of the states.

> No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the states, for the execution of the great powers assigned to it. *Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends.* To impose upon it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the Constitution. *Id.* at 424 (emphasis added).

In *Gibbons v. Ogden, supra*, the Court held that the power of Congress under the Commerce Clause to license vessels plying the coastal trade limited the power of New York to regulate those same vessels sailing in New York waters. Chief Justice Marshall was careful to observe, however, that the plenary power of Congress to regulate commerce does not include the power to compel the states to exercise their governmental powers to regulate activities that Congress itself has the power to regulate. The Chief Justice stated:

> If Congress license vessels to sail from one port to another, in the same state, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a state, *or to act directly on its system of police. Id.* at 204 (emphasis added).

Chief Justice Marshall's analysis of the power of the federal government under the Constitution squarely repudiates the Administrator's assertion of the power to require the states to legislate, to adopt regulations and to enforce federal regulations. The federal power extends to subjects such as interstate commerce. It does not extend to the concurrent powers of the states over those same subjects.

Decisions of this Court involving federal powers other than those exercised under the Commerce Clause have stressed the fundamental principle that the federal government can not require state officers to execute federal laws. For example, in *Ex Parte Kentucky v. Dennison,* 65 U.S. (24 How.) 66 (1860), the Court faced the issue of whether the Governor of Ohio could be compelled to return a fugitive from justice to Kentucky, pursuant to an Act of Congress and Article IV, Section 2 of the Constitution. Chief Justice Taney held that the duty to surrender a fugitive from justice was judicially unenforceable.

> But looking to the subject matter of this law and the relations which the United States and the several states bear to each other, the court is of opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the state; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every state under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel

> him to perform it. . . . [I]f the Governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any other department, to use any coercive means to compel him. *Id.* at 107-110.

In *United States v. Jones,* 109 U.S. 513 (1883), the Court considered the validity of an act of Congress transferring to a state board and a state court the function of determining the value of property taken by condemnation. In upholding that law, the Court indicated that the transfer of functions to state officers and courts was valid only where the state had granted consent.

> . . . [F]rom the time of its establishment [the federal] government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents. . . . The use of the courts of the States in applying the rules of naturalization prescribed by Congress, the exercise at one time by State justices of the peace of the power of convicts under such laws, are instances of the employment of State tribunals and State institutions in the execution of powers of the general government. At different times various duties have been imposed by acts of Congress on State tribunals; they have been invested with jurisdiction in civil suits and over complaints and prosecutions for fines, penalties, and forfeitures arising under laws of the United States. . . . And though the jurisdiction thus conferred could not be enforced against the consent of the State, yet, when its exercise was not incompatible with State duties, and the States made no objection to it, the decisions rendered by the State tribunals were upheld. *Id.* at 519-520.

The Administrator cites *Testa v. Katt,* 330 U.S. 386 (1947), as the sole authority for the proposition that he can require the States to establish and enforce federally imposed transportation control strategies. That case,

involved a suit by a private individual to recover treble damages from another private individual for violation of the Emergency Price Control Act of 1942. This Court held only that a state court cannot, under the Supremacy Clause, refuse to enforce a claim brought under federal law where that court would entertain a similar claim under state law. The case has absolutely nothing to do with congressional power under the Commerce Clause and, consequently, it does not hold, as the Administrator suggests, that the Supremacy Clause is a source of federal power to require affirmative state action to regulate commerce.

The Administrator's theory of supremacy is that federal laws and regulations can require state executive officials to exercise their governmental powers just as the Constitution requires state courts to hear cases arising under federal law. Under the Administrator's theory of the Supremacy Clause, it would be irrelevant whether the state is a "polluter" or has engaged in any activities affecting commerce. The decision to impose additional duties on state executive and legislative branches would be merely a question of the discretion of Congress. If such a theory of supremacy is upheld, then Congress could force the states to assume any part of the burden and expense of regulating commerce. Instead of regulating commerce, Congress would regulate the state governments. That would be repugnant to and destructive of the federal system the founders created.

The States recognize that the Thirteenth, Fourteenth, and Fifteenth Amendments grant Congress the power to intrude "into judicial, executive, and legislative spheres of autonomy previously reserved to the States." *Fitzpatrick v. Bitzner,* 96 S. Ct. 2666 (1976). This Court, however, has made it clear that the powers of the federal government over the states under the Civil War Amendments are considerably greater than the power

of Congress under the Commerce Clause and other provisions of the Constitution. *Id.* at 2670-71. Moreover, even in exercising its broad remedial powers to correct violations of basic rights guaranteed by the Civil War Amendments, this Court has recognized the "delicate issues of federal-state relationships" involved in ordering a mayor or governor to exercise his discretion in a particular way in appointing individuals to public commissions. *See, Mayor of City of Philadelphia v. Educational Equality League,* 415 U.S. 605, 615 (1974) and *Carter v. Jury Commissioner of Greene County,* 396 U.S. 320, 328 (1970).

IV.

THE REGULATIONS WHICH REQUIRE STATES TO MAKE FINANCIAL COMMITMENTS ENABLING WMATA TO PURCHASE BUSES ARE CONTRARY TO THE TERMS OF THE WMATA COMPACT, ARE AN ILLEGAL ATTEMPT TO COMPEL STATE LEGISLATIVE ACTION AND ARE ARBITRARY AND CAPRICIOUS.

Public bus service in the Washington metropolitan area is provided by the Washington Metropolitan Area Transit Authority (WMATA). WMATA operates under an interstate compact entered into by the states of Maryland and Virginia, and the District of Columbia, with the consent of Congress.[104]

Under the compact, WMATA makes plans for the transit needs of the area. The plans are financed by the federal government, the District of Columbia, and the participating local governments. None of those governments, however, is obliged to contribute financially to the plan unless it agrees to do so. (A. 928-29, 933-34). The interests of several of those local governments (Cities of Fairfax and Alexandria and the County of Prince

[104] Act of Nov. 6, 1966, Pub. L. 89-774, 80 Stat. 1324; Virginia Acts of Assembly, Ch. 2 (1966); Ann. Code of Md. (1971 Repl. Vol.) Art. 41, § 117-1, *et seq.* WMATA is governed by a Board of Directors consisting of two directors from each of the jurisdictions that are party to the contract.

William) is best evidenced by their continued participation in this litigation.

A. The States' Proposals for Additional Buses

In 1973, officials from Maryland, Virginia, and the District of Columbia submitted transportation control plans to the Administrator which contained proposals for the acquisition of 750 additional buses by WMATA. Those officials suggested that the buses would be necessary to serve the travel demand generated from the decrease in commuter automobile use anticipated to result from the imposition of parking surcharges and other disincentives proposed by the transportation control plan (A. 901).

The officials, however, had no authority to commit their respective legislatures to appropriate the money for the buses, and they did not assert such authority. In fact, the Virginia plan expressly said, "there is no way air pollution control authorities can prove to EPA that these funds will be allocated" (A. 906).[105]

Moreover, in order to operate the buses, it would also be necessary for the legislatures to provide additional taxing authority to the local governments in order to finance the operating subsidy (A. 905). This, too, the plans could not and did not guarantee.

Apparently, the Administrator did not understand the limitations of the proposals, for he wanted further clarification of the arrangements necessary to expand the WMATA fleet (A. 334). The clarification subse-

[105] The Maryland plan also made no representation that funds would be expended for the buses (A. 334). Maryland's two representatives on the WMATA board are appointed by the Washington Suburban Transit Commission which is a corporate body created by compact under the County Code of Montgomery County and Prince George's County, Maryland. Financial commitments to the WMATA zone in Maryland must be made under contracts approved by the Washington Suburban Transit District.

quently came from the acting chairman of WMATA, Mr. Cleatus Barnett, who testified at a public hearing held by EPA on September 6, 1973 (A. 912).

Mr. Barnett said that WMATA had not agreed to purchase 750 more buses, and none of the WMATA participants had endorsed the proposal (A. 914). He also gave no assurance that WMATA would retain older buses in the fleet, rather than retire them (A. 917).

Mr. Barnett further explained that if any buses were purchased it would be on the basis of programs which WMATA prepared, as feasible, and which the participating governments had endorsed and agreed to finance. There must be agreement "all around the Beltway" plus 80% funding from the federal Urban Mass Transit Administration (UMTA) before WMATA would purchase buses (A. 917-18).

Thus, the Administrator was made aware of the arrangements by which the WMATA fleet might be expanded. First, WMATA itself must develop a feasible plan. Secondly, the legislatures of participating governments, and UMTA, must agree to finance the plan.

Furthermore, the Administrator was clearly advised that WMATA had not agreed to the proposals, and none of the participating governments had endorsed or agreed to finance the plan to purchase additional buses. The WMATA compact does not authorize either the state or federal governments to impose a bus purchase plan on WMATA. Nor does the compact require the participating governments, or the states, to agree to finance a WMATA plan. The transportation control plans submitted by state officials did not purport to alter these arrangements.

B. The Administrator's Regulations Are An Unlawful Attempt To Alter The WMATA Compact And To Compel State Legislative Action.

The regulations promulgated by the Administrator on December 6, 1973, require "representatives" of Virginia, Maryland, the District of Columbia, and WMATA to sign statements, no later than March 1, 1974, indicating that "financial commitments" have been made by the District and the States, or their local governments, to enable WMATA to buy the buses.[106] The statements must also indicate that WMATA has committed to purchase them.

There is no one from the States or WMATA who can sign such assurances if the legislatures of the participating governments have not agreed to appropriate the funds or if WMATA has not determined that the plan is feasible. No such person has the power, under the terms of the compact, to compel the participating governments or WMATA to make these decisions.

Therefore, the Administrator's regulations contravene both the compact rights of WMATA to determine what number of buses, if any, should be purchased, and the compact rights of the participating governments to disagree to the financing. They also totally disregard the fact that Virginia and Maryland have no power or obligation under the compact to make any type of commitment to either WMATA or the participating governments.

If the Administrator feared that the bus proposals were too provisional because of their dependence upon the WMATA compact, then he should have rejected them and promulgated some other measure. He has no authority under the Clean Air Act to alter the terms of an interstate compact which is a law adopted by two

[106] 40 C.F.R. §§ 52.476(g), 52.1080(g) and 52.2435(e); A. 624, 658 and 690 respectively.

states, the District of Columbia and Congress. The Administrator has no power to repeal or amend state or federal laws. The States note, in this regard, that the Administrator has discreetly refrained from requiring a representative of UMTA to certify that UMTA will provide 80% of the funds.

The Administrator's regulations are in fact so contrary to the terms of the WMATA compact that they have gone virtually unnoticed in the ensuing years. Neither WMATA or the participating governments have agreed to purchase the buses specified in the regulations. Instead WMATA and the participating governments have prepared and endorsed their own plans pursuant to the terms of the compact.

WMATA's current plan is shown in its application of June 23, 1976 to UMTA for a federal grant to finance 80% of the cost of 300 new buses. The total cost is $21,120,000. Most of the buses will be regular forty-foot air conditioned vehicles, which now cost $72,000 apiece.

The 300 new buses will be acquired during the fiscal years 1976 and 1977. Their acquisition, however, will not expand the size of the WMATA fleet; the new buses will replace an equal number of old ones, which WMATA is going to sell, to help defray the cost of the new ones. The fleet size in 1977 will be the same as it was in 1974: 2,030 buses. That size is 500 buses less than the 1977 fleet which the Administrator had envisioned would result from his regulations (A. 607).

Therefore, if the States and the District of Columbia can be compelled to pay for the expansion of the WMATA fleet to the size desired by the Administrator, then, by 1977, these governments will have to purchase 500 more new buses, which, at $72,000 apiece, totals $36,000,000. That figure does not include the cost of the operating subsidy. Since it is less expensive for the buses to remain idle than it is to operate them, the buses may not in fact be used.

C. There Is No Justification For Requiring The Purchase Of Additional Buses.

The Administrator has correctly declared on several occasions that increased mass transit is ineffective by itself as a transportation control strategy. To be effective, mass transit must be supported by "disincentives" to private vehicle use. The "parking surcharge" was a crucial "disincentive."

For example in the Federal Register of August 2, 1973 (38 Fed. Reg. 20779), the Administrator stated:

> It is well documented that no matter how well designed and operated a mass transit system is, unless there are disincentives to the use of the private automobile, mass transit will be ineffective. Therefore, Virginia's [and Maryland's and the District of Columbia's] proposals for the surcharge is integral to the success of the plan (A. 377, 254, 333).

On December 6, 1973, in the preamble to the promulgation of his regulations, he stated:

> Despite the objections raised, EPA agrees with the three lead jurisdictions that strong negative disincentives as well as positive incentives are necessary to divert automobile drivers to mass transit. In fact, this is the premise on which the entire transportation portion of the plans submitted by the jurisdictions is based upon (A. 596).

The Administrator's resolve quickly evaporated when exposed to political reality. On January 15, 1974, the Administrator completely withdrew the "parking surcharge" regulations. 39 Fed. Reg. 1848. On June 22, 1974, the President signed into law the Energy Supply and Environmental Coordination Act, Pub. L. 93-319, 88 Stat. 246, which prohibited the Administrator from imposing "parking surcharges."

The government officials of Virginia and Maryland and the District of Columbia have themselves prudently

declined to tread upon the political hotbed of automobile "disincentives". Thus, the "parking surcharge" which was the premise of the bus proposals, and integral to their success, is no longer a part of the transportation control plans.

Therefore, the Administrator's argument that providing additional buses "is simply one measure by which this kind of air pollution can be reduced[107] is a direct contradiction of every statement he has made on that subject in the past. Buying buses does not reduce air pollution. Operating buses does not reduce air pollution. Getting people out of their automobiles might reduce air pollution, but the Administrator will not bell that cat.

D. Conclusion

The States have no power or obligation to provide commercial bus services, except as the state legislatures may desire. State ownership and operation of public highways does not give rise to such an obligation. Even if state or federal laws were to restrict the use of private automobiles, the States are still under no inherent obligation to bus people to work.

Providing additional buses may make laws such as "parking surcharges" more palatable, but that is for the voters to decide, not the Administrator. The voters may want only "parking surcharges" without extra buses. If they decide they want the government to provide more buses, then they can tell their legislature to raise taxes and buy more buses. That is the process for making such decisions under our federal system.

The States ask this Court to consider the real consequences if the Administrator's asserted power is sustained. First, if a state-created transit authority can be appropriated to serve the Administrator's will at the states' expense, then states will no longer create such

[107] Brief for the Federal Parties at 38.

authorities. Second, if formative proposals put forth by state agencies can be thrust back upon the state legislatures as federal mandates, then those agencies will no longer recommend such proposals to the Administrator. Those agencies realize that a state legislature would not support a state agency which exercises the extraordinary power of establishing, by way of a federal administrator, that state's laws and tax structure. Therefore, if the contested regulations are upheld, the ironic result will be that state efforts to provide for mass transit and air pollution control planning will come to an end.

CONCLUSION

For the reasons set forth in this brief, the States request this Court to hold that the Administrator's regulations listed on pages 2-3 *supra* are contrary to the Clean Air Act and are an unconstitutional exercise of federal power. The decisions of the Courts of Appeals for the Fourth and Ninth Circuits with respect to those regulations should be affirmed. The decision of the Court of Appeals for the District of Columbia that the Administrator does not have the power to require the States to adopt, implement and enforce vehicle emission inspection and maintenance programs should be affirmed. The decision of that court upholding the

Administrator's exclusive bus lane and increased bus fleet regulations and that part of the inspection and maintenance regulations prohibiting the States from registering vehicles that do not comply with federal emission standards should be reversed.

Respectfully submitted,

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December 8, 1976

APPENDIX A

VEHICLE EMISSION INSPECTION AND MAINTENANCE PROGRAM FOR THE METROPOLITAN BALTIMORE INTRASTATE AQCR

(38 Fed. Reg. 34249 (December 12, 1973))

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Baltimore, Maryland Transportation Control Plan

* * * * * *

§ 52.1095 Inspection and maintenance program.

(a) Definitions:

(1) "Inspection and maintenance program" means a program for reducing emissions from in-use vehicles through identifying vehicles that need emission control-related maintenance and requiring that such maintenance be performed.

(2) "Light-duty vehicle" means a gasoline-powered motor vehicle rated at 6,000 lb gross vehicle weight (GVW) or less.

(3) "Medium-duty vehicle" means a gasoline-powered motor vehicle rated at more than 6,000 lb GVW and less than 10,000 lb GVW.

(4) "Heavy-duty vehicle" means a gasoline-powered motor vehicle rated at 10,000 GVW or more.

(5) All other terms used in this section that are defined in Part 51, Appendix N, of this chapter are used herein with the meanings so defined.

(b) This section is applicable within the Metropolitan Baltimore Intrastate AQCR.

(c) The State of Maryland shall establish an inspection and maintenance program applicable to all

light-duty, medium-duty, and heavy-duty vehicles registered in the area specified in paragraph (b) of this section that operate on public streets or highways over which it has ownership or control. The State may exempt any class or category of vehicles that the State finds is rarely used on public streets or highways (such as classic or antique vehicles). No later than April 1, 1974, the State shall submit legally adopted regulations to the Administrator establishing such a program. The regulations shall include:

(1) Provisions for inspection of all light-duty, medium-duty, and heavy-duty motor vehicles at periodic intervals no more than 1 year apart by means of a loaded emission test.

(2) Provisions for inspection failure criteria consistent with the failure of 30 percent of the vehicles in the first inspection cycle.

(3) Provisions to ensure that failed vehicles receive within two weeks, the maintenance necessary to achieve compliance with the inspection standards. These shall include sanctions against individual owners and repair facilities, retest of failed vehicles following maintenance, use of a certification program to ensure that repair facilities performing the required maintenance have the necessary equipment, parts, and knowledgeable operators to perform the tasks satisfactorily, and use of such other measures as may be necessary or appropriate.

(4) A program of enforcement to ensure that vehicles are not intentionally readjusted or modified subsequent to the inspection and/or maintenance in such a way as would cause them to no longer comply with the inspection standards. This enforcement program might include spot checks of idle adjustments and/or a suitable type of physical tagging. This program shall include appropriate penalties for violation.

(5) Provisions for beginning the first inspection cycle by August 1, 1975, and completing it by July 31, 1976.

(6) Designation of an agency or agencies responsible for conducting, overseeing, and enforcing the inspection and maintenance program.

(d) After July 31, 1976, the State shall not register or allow to operate on public streets or highways any light-duty, medium-duty, or heavy-duty vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(e) After July 31, 1976, no owner of a light-duty medium-duty, or heavy-duty vehicle shall operate or allow the operation of such vehicle that does not comply with the applicable standards and procedures adopted pursuant to paragraph (c) of this section. This shall not apply to the initial registration of a new motor vehicle.

(f) The State of Maryland shall submit, no later than February 1, 1974, a detailed compliance schedule showing the steps it will take to establish and enforce an inspection and maintenance program pursuant to paragraph (c) of this section, including:

(1) The text of needed statutory proposal and regulations that it will propose for adoption.

(2) The date by which the State will recommend needed legislation to the State legislature.

(3) The date by which necessary equipment will be ordered.

(4) A signed statement from the Governor or his designee identifying the sources and amounts of funds for the program. If funds cannot legally be obligated under existing statutory authority, the text of needed legislation shall be submitted.

APPENDIX B

REVOCATION OF GASOLINE RATIONING REGULATIONS

Federal Register, Vol. 41, No. 201 Friday, October 15, 1976

Title 40—Protection of Environment

CHAPTER 1—ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C—AIR PROGRAMS

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

Revocation of Gasoline Rationing Regulations

Under the Clean Air Act as amended in 1970, State Implementation Plans (SIP's) were required to contain all regulations necessary to attain the health-related national ambient air quality standards (NAAQS) no later than mid-1977. To the extent that State-developed SIP regulations are inadequate to insure such NAAQS attainment, the Act requires EPA to promulgate the necessary SIP regulations.

In 1973, EPA was required by Court orders to promulgate SIP regulations providing for timely attainment of the NAAQS for carbon monoxide and photochemical oxidants in certain areas of the United States. In response to these orders, EPA added to some SIP's a gasoline rationing regulation to take effect in 1977. This type of regulation was imposed only in those areas where EPA found that all reasonably available measures would not be adequate to attain the NAAQS by mid-1977.

At the time EPA promulgated the gasoline rationing regulations and several times since then, EPA has publicly stated that such regulations would produce extremely adverse social and economic consequences if implemented. Since EPA has had no desire to implement the regulations, EPA has since 1973 proposed and

endorsed amendments to the Clean Air Act which would authorize their revocation. Over the last several months, new Clean Air Act amendments which would have authorized such a revocation passed both Houses of Congress (H.R. 10498 and S. 3219). Such authorization was retained in the compromise amendments approved by the House and Senate Conferees. On October 1, however, Congress adjourned without completing action on the new Clean Air Act amendments.

Since it appears quite unlikely that Congress will enact new legislation before implementation of the gasoline rationing regulations is scheduled to begin (certain reports are to be filed by March 1977 and full implementation is to occur in May 1977), and since EPA has no intention of implementing the regulations, I believe that EPA should revoke them now.

I realize that this revocation will render the affected SIP's defective as a legal matter, since such SIP's will no longer contain regulations which provide for NAAQS attainment. I am convinced, however, that whatever benefits may be gained from keeping a technically legal SIP on the books by retaining the gasoline rationing regulations are outweighed by the seriously disruptive social and economic consequences of such regulations.

This revocation should not be construed as indicating that EPA will accept SIP's which do not insure attainment of the health-related NAAQS on grounds of cost. In fact, EPA is currently in the process of notifying many States that their presently-inadequate SIP's must soon be revised to include all achievable measures necessary to attain the NAAQS as expeditiously as practicable. Onerous, expensive, and/or "technology-forcing" requirements must be imposed wherever necessary. EPA's action today is thus a special case; it is being taken only because of the extraordinarily disruptive nature of the gasoline rationing regulations and because both Houses of Congress have affirmatively expressed their desire that such regulations not be implemented.

This revocation is effective October 15, 1976.

(Secs. 110, 301, Clean Air Act, as amended, (42 U.S.C. 1857c-5, 1857g).)

Dated: October 12, 1976.

JOHN QUARLES,
Acting Administrator.

Part 52 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

Subpart F—California

§ 52.241 [Revoked]

1. Section 52.241 is revoked.

Subpart G—Colorado

§ 52.330 [Revoked]

2. Section 52.330 is revoked.

Subpart V—Maryland

§ 52.1110 [Revoked]

3. Section 52.1110 is revoked.

Subpart FF—New Jersey

§ 52.1592 [Revoked]

4. Section 52.1592 is revoked.

Subpart SS—Texas

§ 52.2293 [Revoked]

5. Section 52.2293 is revoked.

APPENDIX C

EXCERPTS FROM THE LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970

1. The report of the Conference Committee summarizes the provisions of the conference version of section 113, the version later enacted by Congress, in the following language:

> In case of a violation of any requirement of a State implementation plan, the Administrator is to notify the State in which the violation occurs as well as the violator. If the violation extends beyond the thirtieth day after notification, the Administrator may issue an order requiring compliance by such person or may bring court action against such person. In case of a State failure to enforce a plan, the Administrator shall notify the State. If the State's failure to enforce such plan extends beyond the thirtieth day after notification, the Administrator is to give public notice of such finding and thereupon, until the State resumes enforcement of [the] plan, the Administrator may enforce the implementation plan either through an order requiring any violator in such State to comply or by bringing court action against any such violator.

H. R. Rep. No. 91-1783, 91st Cong., 2d Sess. 47 (1970). This excerpt gives no indication that section 113 procedures are to be used against a state if it failed to follow the Administrator's dictates in regulating the pollution-creating activities of others.

2. In the December 8, 1970, congressional debates on the conference bill, Senator Muskie, the chief Senate architect of the Clean Air Amendments of 1970, submitted the following statement for the record:

> Federal enforcement under Section 113 leaves the primary responsibility with the States for enforcing requirements under implementation plans. The Administrator can issue an abatement order to a polluter or go to court seeking an injunction only

> after 30 days' notice to any individual polluter, or 30 days after notifying the State that the Federal Government is generally assuming enforcement powers in that State because of a widespread failure of States' enforcement.

A Legislative History of the Clean Air Amendments of 1970, Congressional Research Service, Library of Congress (Serial No. 93-18, Jan. 1974) at 133.

3. The committee report on the Senate bill contained the following language:

> The Committee bill would require that a rigorous time sequence be met in the development of the implementation plan and would provide for the substitution of Secretarial authority if the State plan, or a portion thereof, is inadequate to attain the quality of ambient air established by the nationally promulgated ambient air quality standard.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970).

4. The Committee report on the House bill contained the following language:

> Such emission standards may be enforced either by a State as part of that State's plan or by the Secretary if a State fails to include such standards within its plans.
>
> . . .
>
> Whenever the Secretary finds that as a result of the failure of a State to enforce the plan applicable to such State, any ambient air quality standard is not met, the Secretary is directed to notify the affected State or States, persons not in compliance with the plan and other interested parties. If the failure of the State to take action extends beyond the 30 days after the Secretary's notification, the Secretary may request the Attorney General to bring suit on behalf of the United States in the appropriation U. S. district court to secure abatement of the pollution.

H. R. Rep. No. 91-1146, 91st Cong., 2d Sess. 3, 9 (1970).